Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

January Term, 1999

KERMIE M. KING,

Petitioner,

v.

HERBERT J. THOMAS MEMORIAL HOSPITAL ASSOCIATION,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

A. As a matter of law is an employee judicially estopped from pursuing a claim of age discrimination in employment by virtue of having received Social Security Disability Benefits sometime after having been discharged from employment?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW _____ (i)

TABLE OF AUTHORITIES _____ (iii) (iv)

OPINIONS BELOW _____ 1

JURISDICTION _____ 2

LAW INVOLVED _____ 2

STATEMENT OF THE CASE _____ 2

REASON FOR GRANTING WRIT _____ 7

I. Redress of a claim of age discrimination committed against an employee of advanced age cannot be subject to a per se bar based on the doctrine of judicial estoppel by virtue of soley an award of Social Security Disability Benefits.

CONCLUSION _____ 27

TABLE OF AUTHORITIES

Cases — Page

A.F.D. Falck, S.P.A. v. E.A. Karay Co., - - - - - - - - 26
131 F.R.D. 46 (S.D.N.Y., 1990)

August v. Offices Unlimited, Inc., - - - - - - - - - - - 21
981 F. 2d 576 (1st Cir. 1992)

Bates v. Long Island R.R., 997 F. 2d 1028 - - - - - - 27, 28
(2d Cir.) cert. denied, 510 U.S. 992 (1993)

Chrysler Credit Corp. v. Country Chrysler, Inc., - - - 26
936 F. 2d 1509, 1520 n. 10 (10th Cir. 1991)

D'Aprile v. Fleet Services Corp., - - - - - - - - - - - - 26
92 F. 3d 1 (1996)

Dockery v. North Shore Medical Ctr., - - - - - - - - - 26
900 F. Supp. 1550, 1557-59 (S.D. Fla. 1995)

Kennedy v. Applause, Inc., 90 F. 3d 1477 - - - - - - -22
(9th Cir. 1996)

Kupferschmidt v. Runyon, - - - - - - - - - - - - - - - - 26
527 F. Supp. 570, 574 (S.D.Wis. 1993)

Lowery v. Stovall, 1996 WL 439236 - - - - - - - - - 18, 19
(4th Cir. Aug. 6, 1996)

McNemar v. The Disney Store, Inc., - - - - - - - - - - 18, 21
91 F. 3d 610 (3rd Cir., 1996)

Mishkin v. Peat, Marwick, Mitchell & Co., - - - - - - 27
No 80 Civ. 4301, 1988 WL 391648,
#1 (S.D.N.Y., Nov. 7, 1988) (quoting
18 C. Wright, A. Miller, & E. Cooper,
Federal Practice and Procedures §4477
at 783 (1981))

Mohamed v. Marriott International, Inc., - - - - - - - 24,27
94 Civ. 2336 (S. D. NY, 1996)

Overton v. Reilly, 977 F.2d 1190 (1992) - - - - - - - 26

Robinson v. Neodata Services, Inc., - - - - - - - - - - 26
94 F. 3d 499 (1996)

Smith v. Dovenmuehle Mortgage, Inc., - - - - - - - - 26
850 F. Supp. 1138, 1141-43
(N.D. Ill. 1994)
Wells v. North Carolina Board of - - - - - - - - - - - 15
Alcoholic Control, 714 F. 2d 340
(4th Cir., 1983), cert. denied,
464 U.S. 1044 (1984)
Yanez v. U. S., 989 F. 2d 323, 326 - - - - - - - - - - 12
(9th Cir. 1993) [quoting Morris
v. California, 966 F. 2d 448,
452-53 (9th Cir. 1991)]

Statutes and Rules

28 U. S. C. §1441 - 2
28 U. S. C. §1254 - 2
28 U. S. C. §1291 - 2
29 U. S. C. §1144(a) - 2
42 U. S. C. §323(d)(2)(A) - - - - - - - - - - - - - - - - - 27
42 U. S. C. §1983 - 2
W.Va. Code §5-11-1 - 2

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OPINIONS BELOW

The decision entered by the United States Court of Appeals for the Fourth Circuit dated October 30, 1998, affirming the Summary Judgment granted the Respondent by the United States District Court for the Southern District of West Virginia, which Order is appended as Appendix 1.

JURISDICTION

The United States District Court for the Southern District of West Virginia held that the Court had subject matter jurisdiction over the plaintiff's action pursuant to 28 U.S.C. §1441 and 29 U.S.C. §1144(a). The action was brought under the provisions of the West Virginia Human Rights Act and alleged damages, including a loss of employee benefits, consequent to the acts of discrimination committed against plaintiff. The plaintiff is a resident of the State of West Virginia. The defendant is a domestic not-for-profit corporation which has its principal offices and hospital facility located and situate in the State of West Virginia.

The District Court's decision granting the defendant hospital summary judgment was before the Fourth Circuit Court of Appeals for review pursuant to 28 U.S.C. 1291, as amended. It is from this decision of the United States Court of Appeals for the Fourth Circuit that Petitioner now appeals pursuant to 28 U.S.C. §1254(1).

LAW INVOLVED

The law involved in this matter is predicated upon employment discrimination in violation of Title VII of the Civil Rights Act of 1964 and a denial of her rights in contravention of 42 U.S.C. §1983 and the Age Discrimination in Employment Act (ADEA).

STATEMENT OF THE CASE

This is a civil action brought pursuant to the West Virginia Human Rights Act for acts of age discrimination committed against Petitioner, Kermie Marie King (hereinafter referred to as "Mrs. King"). The Petitioner was an employee of Thomas Hospital for twenty-five (25) years until September 9, 1987 when she was summarily terminated for

allegedly falsifying a time card on August 29, 1987.

Thomas Hospital claimed Mrs. King was seen getting into her vehicle at 2:26 p.m. in spite of having actually signed out on her time card as leaving work at 2:30 p.m. The hospital contended that this infraction of falsifying a time card demanded immediate termination of Mrs. King's employment pursuant to the hospital's personnel policy at that time.

Mrs. King contended that the hospital gave this pretextual reason for her termination in order to rid itself of an older employee who had begun to encounter the expected physical problems associated with aging and who was approaching retirement age. Mrs. King further contended that the hospital's policy and procedures allowed employees a "grace period" of five to seven minutes in arrival or departure from work and that termination was not the only action possible for the hospital to have taken. Mrs. King further contended that the hsopital unlawfully discriminated against her on the basis of her age in contravention of the West Virginia Human Rights Act, §§5-11-1 et seq of the West Virginia Code.

On March 9, 1995, Mrs. King filed her Original Complaint in the Circuit Court of Kanawha County, West Virginia. On April 5, 1995, Thomas Hospital served a Notice of Removal based upon an assertion that the allegation of loss of employee benefits and interference in the subject employee's benefits made this cause of action colorable and thus, totally under the control and auspices of the Employee Retirement Income Security Act (ERISA) and, therefore, removable to a federal jurisdiction.

On August 22, 1996, the United States Court for the

Southern District of West Virginia entered a Memorandum Order granting in part and denying in part Thomas Hospital's Motion For Summary Judgment. The Court denied Thomas' motion insofar as the same pertained to Count I, age discrimination, and denied the motion without prejudice to allow further development of the sole issue of judicial estoppel as a per se bar to the claim of age discrimination. The Court granted the hospital's motion for summary judgment in reference to Count II, wrongful discharge, Count III, intentional infliction of emotional distress, and Count IV, a claim for violation of ERISA.

On August 23, 1996, Thomas Hospital filed a second Motion For Summary Judgment. On December 12, 1996, the Court entered its Memorandum Order and Judgment Order granting Thomas Hospital's Motion for Summary Judgment on Count I, Age Discrimination, based on the Petitioner being judicially estopped by an application for, and an award of, Social Security Disability Benefits.

STATEMENT OF THE FACTS

Kermie Marie King was an employee at Herbert J. Thomas Memorial Hospital for twenty-five (25) years. On September 9, 1987, the plaintiff in this case was terminated for alleged falsification of her time card which occurred on August 29, 1987. The hospital asserted that two employees, Dee Bartoe and Darlene Kestner, saw Mr. King enter her vehicle in the parking lot at 2:26 p.m. on August 29, 1987, after signing out on her time card as having left work at the normal time of 2:30 p.m. This four (4) minute discrepancy was contended by the employer to be a serious act of

dishonesty and a violation of the personnel policy of the hospital which always requires the immediate termination of any offending employee.

The Petitioner on the other hand was unaware of such rigid and severe enforcement of the subject hospital policy and had on a few other occasions during her tenure with the hospital signed out five minutes or less before her actual quitting time without any repercussions or reprimand. Mrs. King contended that there existed a five to seven minute "grace period" regarding signing in or out and, further, was aware of other employees who routinely were permitted various degrees of latitude in signing in or out on the time card, even beyond the few minutes difference at issue in the instant case.

Mrs. King submitted in opposition to defendant's Motion For Summary Judgment evidence of the disparate treatment of older employees in the form of an affidavit and a sworn statement by two employees, Harry Roberts, a co-worker, and Reba Wagner, a supervisor with thirty-five years of service with Thomas Hospital, who attested to the discriminatory treatment meted out to older employees who were approaching age 55 and older.

It was discovered after filing the subject litigation that six months prior to the incident leading to Ms. King's termination, the hospital, for some unknown reason, had computed her early retirement pension rate. This calculation of retirement benefits clearly included a comparison of the amount of an early retirement pension in contrast to full retirement benefits on the normal retirement date. The calculation shows that an early retirement amount would reduce a pension amount by more than one-half of its value.

Mrs. King did not request this computation. Moreover, said computation was done shortly after the director of personnel, Donna Arbogast, was made aware that this particular employee needed an accommodation of her work routine to allow her to sit and get off of her feet for short periods of time rather than stand for her entire 8-hour work shift.

Ms. Arbogast memorialized in a letter to Mrs. King's doctor that any such work accommodation allowing Mrs. King to take breaks and not continually stand, was not possible at the hospital in question. Ms. Arbogast was at the time of Mrs. King's termination the hospital's personnel director who countermanded the plaintiff's immediate supervisors and mandated termination instead of the written reprimand or warning as initially recommended and undertaken by Margaret Eagloski, an eight year employee, who was Mrs. King's supervision. Mr. Eagloski likewise was unaware of the mandatory termination policy despite being in a management position as acting director of the dietary department.

Based upon the aforementioned evidence as well as other evidence offered by the Petitioner in support of her allegations of age discrimination, the district court denied the hospital's motion for summary judgment without prejudice as to Count I in her Complaint for Age Discrimination. The Court proceeded on August 22, 1996, to require further development of only the hospital's argument that Mrs. King was judicially estopped from pursuing this claim of age discrimination based upon an award of Social Security Disability Benefits fifteen (15) months after being fired, which award was backdated to approximately the time of her

termination from her employment. The hospital argued that this award of disability benefits completely destroyed the claim for age discrimination and barred it from being brought to trial on the basis of judicial estoppel.

On December 12, 1996, the district court entered an order ruling that Mrs. King was judicially estopped from pursuing her claim for age discrimination and dismissed the one remaining count in favor of the defendant hospital.

REASON FOR GRANTING WRIT

I. Redress of a claim of age discrimination committed against an employee of advanced age cannot be subject to a per se bar based on the doctrine of judicial estoppel by virtue of soley an award of Social Security Disability Benefits.

The District Court erroneously granted summary judgment as a matter of law to the defendant hospital, Thomas Memorial, by wrongly applying the doctrine of judicial estoppel in this matter.

The Petitioner submits that the extension and application of the legal principle of judicial estoppel, which has been successfully utilized to bar handicapped plaintiffs from pursuing claims for handicap discrimination based on applications for Social Security Disability Benefits, is inappropriate to the circumstances in this case. It is both legally unsound and an inequitable miscarriage of justice when applied to an older employee who was involuntarily terminated because of age discrimination, and is unable to secure other employment in a competitive labor market because of multiple contributing factors, including not only her age and physically handicapping limitations, but also an

employment record reflecting that she was terminated because of alleged dishonesty.

The application of judicial estoppel to thwart this older employee from proceeding to a trial on the merits of her claim for age discrimination cannot be factually or legally supported, primarily as the Petitioner was working without significant complaint by this employer regarding her actual job performance when fired by the employer/defendant. Further, she attempted to find suitable employment for which she was qualified for months following her termination and only applied for benefits upon being unsuccessful in obtaining other employment. It was Mrs. King's intention to continue her employment until normal retirement age even with her physical impairments and "but for" the discriminatory acts of the defendant would have done so.

Being "unable to work" for the purposes of eligibility for Social Security Disability Benefits does not exclude the reality of an individual still being able to perform the essential functions of a particular position, both with or without reasonable accommodation. It is legally unsound and inequitable to apply judicial estoppel to dismiss an action for age discrimination based on the naked award of such benefits.

The Social Security Act statutorily allows for a combination of vocational-medical criteria to formulate the basis for an award of disability benefits and this can not establish prima facie evidence of an inability to perform previous job functions, especially when a handicapped elderly person has the desire to, and is motivated to, continue to work.

At the time of her termination by the hospital, this Petitioner was an older employee who was 58 years of age,

and was performing her job satisfactorily for the hospital. Mrs. King asserted that she was terminated by Thomas Hospital for the sole reason that she was an elderly employee who did have a handicapping condition. Mrs. King was no longer going to be able to perform her job duties without minor accommodations.

Mrs. King neither applied for disability retirement nor any other disability benefits when terminated by Thomas Hospital, nor did this hospital even consider retirement under a disability pension pursuant to any provisions of their employee benefits plan when terminating this employee. Additionally, as is evidenced by the unsolicited computation of her pension benefits, the Petitioner would have drawn a substantially higher pension had she retired at her normal retirement age.

Therefore, it is not in the interests of either justice or fairness to dismiss all consideration of the material issues between these parties pertaining to the alleged acts of age discrimination predicated solely on an after-acquired award for disability benefits sought months after fruitless efforts to acquire another job, with her Social Security Disability Insurance benefits, sometimes hereinafter referred to as "SSDI" benefits, being granted over 15 months after the complained of actions by this hospital against this employee.

On August 23, 1996, Thomas Hospital again renewed a motion for summary judgment based upon an argument that judicial estoppel barred Mrs. King's claim for age discrimination which had already survived a previous motion for summary judgment by the hospital based on the argument that no material issues existed between the parties.

Thomas Hospital's pleading to judicially estop this cause of action was based solely upon an award of Social Security Disability Benefits which was granted more than a year and three months after the hospital terminated Mrs. King's employment.

During the 15 months between being fired and being awarded her SSDI benefits, there was clear evidence submitted to the Court of Mrs. King's attempts to secure reemployment. There was further evidence submitted showing that during said 15 month period the Petitioner had been awarded unemployment benefits by the State of West Virginia based upon her being both willing and able to work and during which she was actively seeking reemployment. Unemployment benefits cannot be awarded in West Virginia to any individual who will not agree to seek reemployment or accept employment if offered. This evidence was not rebutted by Thomas Hospital.

This is a case of age discrimination which must not be obscured and confused by any defense argument which cites precedent which focuses on claims of disability discrimination and the ADA and which entails very defined, but significantly different legal issues. To involuntarily terminate an older employee because she is of an advanced age is unlawful, and cannot be diminished or legally justified by an after-the-fact award of any disability benefits, particularly awarded more than a full year after such illegal conduct occurred, which conduct rendered the employee unemployed and quite possibly unemployable by virtue of the nature of the termination.

No equitable application of judicial estoppel would factually support such a ruling in a case as is presently before

this Court. Mrs. King's age combined with a physical impairment, together with an employment record that showed that she was terminated involuntarily due to her alleged dishonesty with her previous employer, significantly interfered with successful reemployment, which in no way is dispositive of her ability or inability to maintain and perform her past employment.

The seeking of employment at an advanced age for almost a full year after being fired makes the issues at hand completely separate and totally unlike any ADA claims as based upon a defendant's failure to accommodate a handicap which directly leads to a cessation of a plaintiff's employment. Allegations that an employer did not accommodate a handicap, thus leading to discharge, are not the issues upon which this case was built. This case is about wrongfully discharging an employee on a clearly pretextual reason to rid the defendant hospital at a bargain basement monetary rate of the liabilities and economic responsibilities owed to an older employee approaching full retirement, an act which saved this hospital a significant amount of money because of the dramatically reduced pension Mrs. King receives, as well as the loss of the other benefits to which she would have been entitled had she worked until her normal retirement age.

The failure of this hospital to allow this older employee to occasionally sit down on regularly scheduled breaks, instead of standing throughout the full eight hours of her work day, was evidence of the Respondent's clear intentions to create an intolerable work environment for this loyal and long time employee who was known by the Respondent to be experiencing the effects of arthritic legs and

feet. It was always an issue of age discrimination and intentional harassment to hasten this employee to end her employment before the normal retirement date.

The purpose of the doctrine of judicial estoppel is to protect the integrity of the judicial process. Accordingly, the doctrine of judicial estoppel is an equitable doctrine invoked by a court at its discretion. Yanez v. U. S., 989 F. 2d 323, 326 (9th Cir. 1993) [quoting Morris v. California, 966 F. 2d 448, 452-53 (9th Cir. 1991)]. Its purpose is clearly not the expeditious demise of meritorious age discrimination claims by virtue of a naked defense such as the plaintiff simply having received some type of disability benefits after the fact must stand as a per se bar to her claim of unlawful discrimination.

Kermie Marie King did not resign her job nor did she seek disability benefits until long after she found herself unemployable and without any reasonable means to secure new employment after being fired from her job by this Respondent. This does not, by any reasonable application of judicial estoppel, prove a prima facie case that Mrs. King was unwilling or unable to continue with her former employment at Thomas Hospital at the time of her discharge over a year earlier, nor that she was unable to perform the essential functions of that job, it only shows that there came a point after Mrs. King was fired that she elected to apply for disability after unsuccessful efforts to acquire another job.

At no time did Petitioner apply for disability benefits through the Respondent, nor seek any other disability benefits after she was discharged. Mrs. King was terminated for alleged fraudulent conduct, conduct which Mrs. King contends had been tolerated and, in fact, openly permitted

other younger employees. The facts surrounding this discharge were not remotely dependent on issues of any inability to perform the job at issue or an unwillingness to continue working because of any physical problem or condition. In fact, Mrs. King had a friend call the personnel office the day after being fired to see when she could return to work. She did not even understand the serious action taken against her.

The Respondent has misused, abused, and widened the recent defenses utilized in ADA cases and other handicap discrimination cases to encompass and thwart this cause of action pertaining to age discrimination. Petitioner in this matter was not terminated by the employer because she was not satisfactorily performing her job at Thomas Hospital. Both of Mrs. King's supervisors, Donna Arbogast and Darlene Kestner, testified in their respective depositions that Mrs. King was a valued employee with no significant problems regarding her job performance. Petitioner in this action has brought suit against her former employer for terminating her upon a bogus, pretextual reason to rid itself of an older employee. This termination occurred at a time when reemployment would have been difficult even without the added obstacle of being fired for "gross misconduct" involving her honesty.

In this matter Mrs. King neither quit her job nor voluntarily thrust herself back into the competitive labor market in the face of her advanced age, limited education, narrow manual labor skills, and arthritis, all to her undeniable disadvantage and detriment in possibly being able to secure another job. The Respondent unlawfully forced that upon her.

Now, this employer has secured legal absolution of its acts by argument that when Mrs. King was faced with months of unemployability for approximately a year after being fired, the Petitioner's right to any relief for the wrongs done to her by the employer were totally lost upon her mere application for, and subsequent award of, Social Security Disability Benefits. This application for benefits followed almost a year of Mrs. King unsuccessfully seeking reemployment. This unemployability was the direct result of the very circumstances set into motion by this hospital and the claim for benefits was decided upon grounds that do not prove that Mrs. King could not perform her job at Thomas Hospital or even stated that she was unable to perform that job.

"But for" the discrimination committed against this older employee, Mrs. King would not have needed the employment which she sought, but was unable to secure. The Respondent offered absolutely no evidence to contradict this fact. Whatever may have occurred for over a year following termination cannot legally excuse this employer's wrongful and unlawful act in September, 1987, nor should it now fortuitously be utilized to form a legal foundation upon which to build a successful defense related to judicial estoppel to defeat a meritorious claim of age discrimination.

In this instance, not only the Petitioner's physical condition was considered to determine her eligibility for SSDI benefits, but also her education, lack of other marketable skills and, most importantly, her age, all were utilized to establish the statutory basis for an award of disability as defined by the Social Security Act. This fact can not cancel out the hospital's discriminatory actions nor stand as any proof that this Petitioner has sworn to inconsistent positions

to gain some unfair advantage. The Petitioner's circumstances stand as evidence of the egregious harm done to her by virtue of an unlawful termination of her employment, which employment she was successfully maintaining despite all of the aforementioned conditions.

In Wells v. North Carolina Board of Alcoholic Control, 714 F. 2d 340 (4th Cir., 1983), cert. denied, 464 U.S. 1044 (1984), the Appellate Court held that it would not limit the award of damages to a plaintiff who subsequently suffered a back injury, sought light duty from an employer, was refused, and quit. The Court held that "but for" the employer's discriminatory behavior the plaintiff would not have quit his employment and suffered monetary damages. "But for" the discriminatory acts of this Respondent, in unlawfully terminating Mrs. King's employment, Petitioner would not have been out seeking employment that she could not find.

The employer sought legal vindication for its wrongful conduct of illegally discriminating against an older employee, resulting in her inability to continue to support herself. It sought this legal absolution through fortuitous judicial estoppel argument borne of Petitioner's after-acquired award of SSDI benefits to ameliorate the very damages arising out of and directly resulting from the Respondent's own actions the year before. The very nature of this termination on grounds of gross dishonesty constituted a serious barrier to any individual's securing other employment, placing a serious indelible black mark upon her which would be hard to overcome for even a younger and more desirable prospective employee.

An application for disability benefits in this case in no

way proves that this plaintiff stated she could not perform any work in September, 1987, nor was there any underlying cause for this termination in September, 1987, based upon any allegations of deficient work performance or inability to perform in Thomas' dietary department. In fact, for almost a full year, Mrs. King actively sought reemployment, received unemployment benefits based upon her capability and availability for work, and never by word, deed or action indicated that she could not work. Whatever statements were made by Mrs. King after a year of unemployment and inability to secure a new job can not contradict, diminish, or legally excuse this employer for unlawfully discharging Mrs. King the year before and causing the very harm inflicted upon her by the repeatedly documented false allegations that she was dishonest and had been fired for "gross misconduct" which ultimately contributed to the need to apply for disability benefits.

This is neither similar to any precedent as was previously cited by Thomas Hospital in its memorandum in support of summary judgment, nor is it equitable in the eyes of any fair interpretation of the anti-discrimination laws. The circumstances in this case are far removed from the defenses being utilized by defendants to defeat ADA causes of action wherein a plaintiff seeks damages for loss of a particular job that he could not, or chose not to, perform at the very time of the termination of that job. Mrs. King had no such option of working or not working and, in truth and fact, was performing her job satisfactorily when fired based upon a pretext of gross misconduct.

The fact that Mrs. King could not overcome the adverse circumstances created by being discharged for

dishonesty, her advanced age, limited work experience, limited job skills, and physical problems after a year of seeking employment, should not be permitted to be the legal foundation for dismissal of this action on behalf of the hospital who caused such hardship and losses which ultimately forced Mrs. King to apply for benefits. Such a ruling, wherein age is a central material issue and also a determining factor in possible eligibility for benefits, eviscerates the legal core of the majority of age discrimination actions and reduces them to a point of being ineffectual and legally meaningless.

Employers could simply illegally terminate older employees and then await the economic realities and hardship of being fired at a time close to retirement, which are inevitably created by forcing the older employee back into the labor market at such time, to require that employee to apply for particular benefits, such as employer sponsored disability benefits or SSDI benefits. In essence, the very damages created by the employer's wrongful acts and the hardship they create would serve to free the employer from any liability for such unlawfully conduct. The cost and penalties for employment discrimination against the older employee would simply be passed along to some other source besides the employer at fault by simply waiting for the possible application for certain benefits and related financial relief.

In the majority of the precedents wherein a defendant has invoked judicial estoppel to bar actions for handicap discrimination, the plaintiffs at issue, either before or immediately upon cessation of their job, sought total and permanent disability benefits of one kind or another. These plaintiffs, each and every one, either by action, application,

or sworn statement clearly avowed the inability to perform any work at the very same time that they were litigating the employer's failure to accommodate their handicaps so that they could presumably work. Many courts have invoked judicial estoppel to bar such causes of actions brought under ADA because of what these courts deem to be these inconsistent positions as taken by plaintiffs.

Regardless of the validity of such argument or the equity in such court rulings, it is absolute that each case must be carefully decided upon a thorough review of the particular circumstances and facts intrinsic to each specific case. "Application of the doctrine of judicial estoppel always is factually driven." McNemar v. The Disney Store, Inc., 91 F. 3d 610 (3rd Cir., 1996).

It is, therefore, incumbent in adjudicating any matter potentially invoking judicial estoppel to bar a cause of action to carefully examine very closely every relevant fact and circumstance surrounding and underlying the subject action to determine if, in fact, an inconsistent position has been taken by the plaintiff to deliberately thwart the purposes of justice and equity in that particular matter. It has been consistently followed by each court that careful consideration be given each individual case.

As cited in Lowery v. Stovall, 1996 WL 439236 (4th Cir. Aug. 6, 1996), "[J]udicial estoppel is properly defined as a bar against the alteration of a factual assertion that is inconsistent with a position sworn to and benefitted from in an earlier proceeding." Mark J. Plumer, Note, Judicial Estoppel: The Refurbishing of a Judicial Shield, 55 Geo. Wash. L. Rev. 409, 435 (1987).

In Lowery certain necessary elements that must be

met before applying judicial estoppel were set forth by the Appellate Court. These elements are as follows:

1) The party sought to be estopped must be seeking to adopt a position that is inconsistent with a stance regarding a factual matter taken in a previous litigation.

2) The prior inconsistent position must have been relied upon and accepted by the court.

3) Finally, the party sought to be estopped must have intentionally misled the court to gain unfair advantage. This precludes the application of judicial estoppel in any matter where it is determined by the Court that a party's prior position was based on mere inadvertence or mistake.

Petitioner submits that there is no evidence supportive of any inconsistent stance taken by her in this matter remotely justifying a bar to her cause of action for age discrimination, nor can any deliberate intent to mislead or gain unfair advantage be attached to this plaintiff as contemplated by Lowery, supra. Petitioner's award of Social Security Disability Benefits fifteen (15) months after being fired is evidence of the Petitioner's year of unemployability due to her age, limited work skills, education, and incapability due to arthritic feet and legs, and an employment record that reflects that she was terminated for gross misconduct involving her being dishonest. The application for disability benefits occurred many months after being fired and seeking reemployment. It is evidence of the harm done the plaintiff, and does not stand as any inconsistency in the positions she has taken in any forum.

Mrs. King, actively sought employment and was herself both clearly willing and available for work by virtue of the acceptance and receipt of unemployment benefits. By

neither her actions nor her statements at the time of discharge, or for any substantial time thereafter, did she ever take the position that she could not perform the essential functions of her job. Almost a year following discharge by this hospital, and finding herself still without employment and income at that late date, Mrs. King did seek disability benefits upon advice of her sister. Petitioner testified to this in her deposition of April 24, 1996.

Moreover and legally most importantly, this after-acquired benefit is not awarded on disability alone, but is statutorily determined on physical impairment in light of such vocational/medical criteria as age, work skills, and reasonable employability in the local competitive labor market. It would be impossible to sever the affect of an individual's age upon compensability under Social Security, particularly in this case, and to deny that age adversely diminished the ability to acquire and sustain gainful work activity as defined by Social Security.

The Social Security Act has long recognized this basic reality which the district court dismissed and overlooked in this matter to grant its dismissal of this action. The Petitioner's arthritic limbs did not, in and of themselves, determine this award of SSDI benefits, but rather the totality of the vocational/medical criteria determined the award. This in no way relegates the likelihood of her continued successful employment at her previous job inconsistent to Mrs. King's position in obtaining SSDI benefits over a year later.

The Respondent presented not one scintilla of evidence to show that Mrs. King was not satisfactorily performing her job at Thomas Hospital at the time the defendant fired her. Upon the record, it is abundantly clear

from Respondent's own disclosures that Mrs. King was receiving satisfactory evaluations all the way up to and including the time of her termination.

Mrs. King certainly never uttered one statement upon discharge that she could not work. In fact, upon being terminated as previously cited, she requested a friend call the personnel office to see when she might return to work, not comprehending that she had been fired. This has been placed in evidence by virtue of the testimony of plaintiff's friend at the Unemployment Hearing.

In McNemar v. Disney Stores, supra, plaintiff McNemar, immediately upon his dismissal, applied for and received New Jersey state disability benefits, Social Security disability benefits, and an exemption from repayment of a student loan because of a stated inability to maintain gainful employment. More importantly, plaintiff McNemar and his doctors, under penalty of perjury, swore that McNemar had been totally and permanently disabled for at least five weeks before he was discharged by Disney.

This case was a cause of action brought under ADA by a young man who alleged, under oath, he was totally unable to work even before he was discharged. This case is as dissimilar from the instant matter as legally and factually possible and in no way parallels the case at hand.

In August v. Offices Unlimited, Inc., 981 F. 2d 576 (1st Cir. 1992), the plaintiff was a salesman who suffered from severe clinical depression. As a result of his severe depression, he asked for and received a six week leave of absence from his job. August requested and received another two weeks sick leave to more fully recuperate.

After eight weeks of paid sick leave, August requested

to return to work on only a parttime basis. His employer refused this request and suggested he apply for company disability benefits if he could not return to work full-time. The plaintiff August before his scheduled return to work did apply for a claim under the company's disability plan. He asserted in the application for this benefit that he was totally and continuously disabled at the precise same time he was presumably seeking to return to work. By his own admission before even attempting a return to work, August asserted he could not maintain any employment. In August, the court held "the record [was] fatally bereft of indication that August possessed the ability to perform his job." Id. at 581.

This is completely dissimilar to the instant action wherein plaintiff King sought employment, was willing and able to work after discharge, and only received "after acquired" benefits following an inability to acquire employment, which "but for" the actions of the defendant at hand would not have been necessary.

In Kennedy v. Applause, Inc., 90 F. 3d 1477 (9th Cir. 1996), plaintiff was diagnosed as suffering from chronic fatigue syndrome. While on medical leave for this disabling condition, Kennedy and her physician submitted evidence to support that she was unconditionally unable to perform any work whatsoever in order to obtain for Kennedy state disability benefits and Social Security benefits.

Kennedy and her doctor offered sworn statements that she was totally unable to perform any work before she was even discharged from her employment. With both Kennedy and her physician attesting to Kennedy's complete inability to perform any job before she was even fired, the Court found her later statements in her civil suit that she was fully

capable of performing her former job inconsistent and irreconcilable with the facts surrounding her application for disability benefits while still employed.

The employer in the instant case cannot in any fair or reasonable manner present even a scintilla of evidence which supports Mrs. King was not satisfactorily performing her job and arriving faithfully each day at work at the precise time she was terminated. Thomas Hospital neither offered disability benefits nor was asked by Mrs. King to provide disability benefits at the time of discharge. More to the point, Respondent cannot rationally ask any Court to simply ignore and disregard the months that Mrs. King sought employment in the local labor market before applying for disability benefits, which unemployment was rooted in being fired by this employer at an advanced age with known physical limitations.

"But for" the employer's unlawful actions, Kermie Marie King could have continued in her employment with the hospital for a number of years, possibly even until full retirement age. Given the circumstances and issues material to this discharge, the SSDI benefits awarded a year or more after the employer's wrongful conduct cannot stand as remotely having reasonable affect or bearing upon the facts of this case to unfairly alter or color this claim of discriminatory acts.

Thomas Hospital not only fired this employee illegally, but clearly at a time in her life when reemployment would be difficult even under the best of circumstances. The award of disability benefits fifteen months after the firing of this woman and based upon the permissible vocational-medical criteria contained in the Social Security Act, can not

equitably dispense with the illegal actions committed by this blameworthy employer nor stand as inconsistent with any assertion made by Mrs. King.

At the time of her termination, Mrs. King was approaching sixty years of age, had limited work skills, was absolutely functioning in full-time employment despite arthritic legs, but after being fired, was inextricably marked by the employer with a work history marred by accusations of gross dishonesty and misconduct. This certainly did not insure reemployment. Thomas Hospital argued this undeniable harm and damage which is totally its sole responsibility, both legally and morally, be simply washed clean and disposed of because the Social Security Act recognized all of these vocational-medical conditions as disabling to a sixty year old employee who following discharge could not acquire substantial gainful work activity in her local community.

The Social Security benefits applied for and awarded to Mrs. King were earned solely by her. The benefits were after acquired benefits arising from and made necessary by the tortious acts of the employer the year before in firing an almost sixty year old woman with no skills and having physical limitations related to aging. Petitioner submits that Thomas Hospital should not now be rewarded for its actions by virtue of the very fruits of the harm and damage it caused.

In Mohamed v. Marriott International, Inc., 94 Civ. 2336 (S. D. NY, 1996), a very thorough and relevant opinion was issued discussing the issues and clear distinctions between the ADA standards and Social Security standards for determining disability. This has significance in consideration of the instant matter. In Mohamed, the Court emphasized

that "disability" for the purposes of receiving Social Security benefits are based on different legal standards, different forums and levels of formality, different goals, and very different definitions of "disability". It was clear from such discussions by this Court that "unable to work" has very broad and far-reaching meanings pursuant to Social Security guidelines and purposes, even to the extent of holding an individual unable to work for purposes of providing benefits while the individual is actually working. For this reason, the Court held that statements on an application for benefits would not bar an ADA claim or be dispositive of the material issues intrinsic to claims of discrimination by an employer.

Instead, that Court clearly held that "[I]t would be inappropriate to invoke the . . . doctrine of judicial estoppel to erect a per se bar to ADA protection for individuals who have also applied for and/or received SSDI benefits". Petitioner states it is no less inappropriate to erect such a per se bar to the legal protections for older workers under ADEA or state anti-discrimination laws. It is factually possible for an older employee to be able to function at a particular job but upon termination, become unemployable and pursuant to the definition of "disability" eligible for Social Security disability benefits.

Additionally, EEOC has issued a Guidance as of February 12, 1997. This Guidance has clearly established that a plaintiff can proceed with a cause of action under ADA even though he or she has applied for disability benefits, including Social Security Disability Benefits. EEOC states that an employee can be both "qualified" under ADA and "totally disabled" for purposes of Social Security, workers' compensation or disability insurance because of the clearly

varying definitions utilized by each. Further, the EEOC holds that, in general, the effect of any disability application is a factual issue requiring consideration by a jury and rendering summary judgment inappropriate.

Courts have rejected judicial estoppel as a bar to causes of action for handicap discrimination under either ADA or the Rehabilitation Act when the plaintiff has sought disability benefits. Overton v. Reilly, 977 F.2d 1190 (7th Cir., 1992); Kupferschmidt v. Runyon, 527 F. Supp. 570, 574 (S.D. Wis. 1993); Smith v. Dovenmuehle Mortgage, Inc., 850 F. Supp. 1138, 1141-43 (N.D. Ill. 1994); Robinson v. Neodata Services, Inc., 94 F. 3d 499 (8th Cir., 1996); and, D'Aprile v. Fleet Services Corp., 92 F. 3d 1 (1st Cir., 1996). In D'Aprile, the court held as follows, "[S]ince D'Aprile never claimed to have been totally disabled during the time she requested her accommodation, and demonstrated her ability to work with the accommodation she requested" her claims are totally consistent and cannot be barred by application of judicial estoppel.

Judicial estoppel has only been applied with extreme caution by courts and has been openly criticized by some. See e.g., Chrysler Credit Corp. v. Country Chrysler, Inc., 936 F. 2d 1509, 1520 n. 10 (10th Cir. 1991); A.F.D. Falck, S.P.A. v. E.A. Karay Co., 131 F.R.D. 46 (S.D.N.Y., 1990); and Dockery v. North Shore Medical Ctr., 900 F. Supp. 1550, 1557-59 (S.D. Fla. 1995).

It has further been clearly held by courts that there may exist legitimate reasons for a plaintiff to take what may appear to be inconsistent positions in different proceedings that certainly do not prove the intent of that plaintiff to play fast and loose with either proceeding.

"As with other principles of fairness, care must be taken that this approach not lead to undue moralizing that may overlook reasonable grounds for changing positions on the basis of new information. Mishkin v. Peat, Marwick, Mitchell & Co., No 80 Civ. 4301, 1988 WL 391648, #1 (S.D.N.Y., Nov. 7, 1988) (quoting 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedures §4477 at 783 (1981)).

It is also noted that courts have taken cognizance of the potential conflict existing between the underlying principle of judicial estoppel and the Federal Rules of Civil Procedure regarding pleading. Circumspection in the use of judicial estoppel is warranted because of a concern for offending the liberal spirit of the federal pleading rules. Mohamed, supra. Judicial estoppel is in tension with the alternative pleading provisions of Federal Rules of Civil Procedure, Rule 8(e)(2). Bates v. Long Island R.R., 997 F. 2d 1028 (2d Cir.) cert. denied, 510 U.S. 992 (1993).

CONCLUSION

Under the Social Security Act, an individual may be deemed totally disabled pursuant to various criteria or such criteria in combination with one another which does not necessarily establish absolute prima facie evidence of an inability to perform the essential functions of a previous job or the intent of a plaintiff to alter facts to gain some undeserved advantage in litigation. Under 42 U.S.C. §423(d)(2)(A), consideration of age, education and work experience, as well as availability of work in the national economy or in a particular region, is equally determinant of

eligibility for benefits. This can not, by any legal or equitable measure, form the foundation for a per se bar to a claim of discrimination for any plaintiff who is required to apply for and receives Social Security Disability Benefits, particularly following a year of unemployability after being wrongly discharged and by such discharge, having been falsely branded a dishonest employee who committed an egregious act of gross misconduct.

In this matter, the Petitioner was almost sixty years old with limited education, no transferable work skills, and had arthritis of the legs and feet which affected her functional capacities to walk quickly or stand continuously. Despite these limitations, plaintiff satisfactorily maintained her job with Thomas Hospital. The hospital discharged her in the face of such conditions.

It is neither inconsistent nor unreasonable for such a plaintiff to seek disability benefits to support herself in light of her permanent physical impairment and the continuing inability to find gainful employment following an involuntary discharge. This does not prove that plaintiff was unable to perform the essential functions of her previous job, particularly as she was satisfactorily performing her job duties when she was fired. No issue was raised by the employer or the employee at the time of discharge, or at any reasonable time thereafter, that the plaintiff was not performing all of the essential functions of her job, despite having the arthritic condition while employed.

It was held in Bates, supra, that judicial estoppel serves two objectives, which are as follows: (1) preserving the sanctity of the oath by requiring consistency in sworn positions, and (2) protecting judicial integrity by avoiding

inconsistent results in two proceedings.

In this matter, Mrs. King alleged her employer discharged her on the pretextual reason of dishonest conduct which constituted gross misconduct, when in fact, the employer intentionally ended her employment solely because she was advanced in age. Approximately one year after being discharged, plaintiff remained unemployed and consequently applied for Social Security Disability Benefits at age sixty with diagnosed arthritis of her legs and feet. The award of benefits was backdated to the approximate last date on which plaintiff worked. These claims are not mutually exclusive and do not reach any remote level of proof that Mrs. King either falsely swore to inconsistent positions or that she intentionally misled any Court to unjustly create an advantage in either one of these two independent forums.

Certainly, the severely preclusive legal effect of this doctrine demands a stronger foundation in fact and some assurance that its application followed, and is a direct product of, a fair judgment on the merits of the issues and some presentation of relevant evidence, and is not merely an empty per se bar technically invoked by a defendant to deny justice to a wronged plaintiff.

Kermie Marie King was tossing salads, carrying food trays, and performing her assigned tasks in the dietary department at Thomas Hospital on the very day she was openly discharged for alleged dishonest conduct and humiliated by being led out of the hospital in which she had faithfully worked for twenty-five years. She had been performing these job functions despite her arthritic legs and feet. In fact, this hospital allowed Mrs. King to complete her entire work shift before telling her at the very end of the

work day that she was fired and must clean out her locker.

Mrs. King was degraded and defamed by an allegation by Thomas Hospital. At age sixty, she found herself suffering from arthritis, unemployable for months following her termination, and consequently applied for Social Security Disability Insurance Benefits because she could not yet qualify for Social Security Old Age benefits. In applying for these disability benefits months after being fired, Mrs. King could neither diminish nor enhance any of the material issues relevant to the actions taken by her employer. The central issues of age discrimination and wrongful discharge for a pretextual reason were central to this case and should have remained unaffected by an award of SSDI benefits. No fact was altered and no truth shaded by Mrs. King's application for the same to survive having been fired.

Judicial integrity is not threatened by the award of the SSDI benefits in this case but rather is more than directly attacked by the dismissal of this action by the district court in the face of all of the compelling evidentiary facts necessitating that this matter be brought to trial.

Respectfully submitted by:

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Dated: January 28, 1999

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

KERMIE M. KING,
Plaintiff-Appellant,

v.

HERBERT J. THOMAS MEMORIAL HOSPITAL, a non-profit West Virginia corporation,
Defendant-Appellee.

No. 97-1075

Appeal from the United States District Court
for the Southern District of West Virginia, at Charleston.
John T. Copenhaver, Jr., District Judge.
(CA-95-252-2)

Argued: March 2, 1998

Decided: October 30, 1998

Before ERVIN and NIEMEYER, Circuit Judges, and
BROADWATER, United States District Judge for the
Northern District of West Virginia, sitting by designation.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Ervin and Judge Broadwater joined.

COUNSEL

ARGUED: David Stephen Skeen, South Charleston, West Virginia, for Appellant. Charles MacKinley Surber, Jr., JACKSON & KELLY, Charleston, West Virginia, for Appellee.

OPINION

NIEMEYER, Circuit Judge:

Kermie M. King's long-time employment as a dietary aide at the Herbert J. Thomas Memorial Hospital in South Charleston, West Virginia, was terminated on April 9, 1987, because she falsified her time card. Following her termination, King filed this action, claiming, among other things, that Thomas Memorial Hospital discriminated against her by reason of her age in violation of the West Virginia Human Rights Act. That Act requires King to establish that at the time of the defendant's allegedly discriminatory action, she was "able and competent to perform the services required" of her employment. W. Va. Code § 5-11-9(1).

In addition to filing this action, King applied for and was awarded disability benefits by the Social Security Administration, retroactive to one week before her discharge. Finding that King had represented to the Social Security Administration that she had a severe impairment that made her unable to do her previous work as of the time of her discharge, the district court granted summary judgment for Thomas Memorial Hospital on the grounds that King was judicially estopped from asserting that she was "able and competent" to perform her previous job, as required by West Virginia law.

Because we agree with the district court that King should be judicially estopped from maintaining that she was "able and competent" to perform her previous job and because, in addition, we conclude that she has failed to present sufficient evidence to show that she would not have been terminated "but for" her age, we affirm.

I

King's employment as a dietary aide at Thomas Memorial Hospital required her to assist in such food production tasks as tossing salads and delivering food trays to patients. Before her discharge on September 9, 1987, she had worked in this capacity for 25 years.

King's employment at the hospital was regulated by published policies and an employee handbook. The six-page "Policy for Recording

Time Worked and Instructions for Time Card Recording" included the following instruction, printed in all capitals and underlined: "RECORD THE ACTUAL TIME WHEN COMMENCING WORK AND THE ACTUAL TIME WHEN CONCLUDING WORK. (FALSIFICATION OF TIME CARD WILL RESULT IN TERMINATION)." Similarly, the employee handbook listed 30 offenses for which disciplinary action was specified, including "falsification of time card," for which the specified sanction for the first offense was discharge. King acknowledged that she had been aware of these policies before August 1987.

On August 28, 1987, King's immediate supervisor observed King leaving work at 2:20 p.m. and, a few minutes later, getting into her husband's car and exiting the hospital grounds. On her time card, King had signed out as of 2:30 p.m. King's supervisor and her department head subsequently counseled King, who acknowledged leaving early, and issued her a written warning. The warning noted that King's job responsibilities included "deliver[ing] all late trays up to 2:30 p.m." and that the department had "received several complaints about late trays not being delivered at this time." The warning further notified King that any additional occurrences would result in her suspension and would require her to check in with her supervisor before signing out each day.

On review of this written warning, the hospital's director of personnel questioned King about the incident. During the course of this interview, King acknowledged that she had left early on August 28, as well as on several other occasions. She also acknowledged that in each case she had falsified her time card. While King admitted that she knew of the hospital's time card policy and the mandated sanction for falsifying entries, she explained, "I felt others had done the same thing and that is why I did it." The director of personnel changed the sanction on the incident form to "discharge," as required by hospital policy, and then terminated King's employment.

On November 3, 1987, King filed an age discrimination claim with the West Virginia Human Rights Commission, alleging, "I was discriminated against because of my Age, 58, in that . . . [d]ue to a reduction in Patient Census, the [hospital] reportedly plans to reduce the workforce by deleting certain positions." The Human Rights

Commission investigated the charge, and on April 5, 1988, issued a finding of no probable cause to believe that Thomas Memorial Hospital had engaged in unlawful discrimination.

After her discharge, King also applied for Social Security disability benefits based on her physical condition which had manifested itself almost a year earlier. During the year before her discharge, King's doctor had written to Thomas Memorial Hospital on King's behalf, urging that the hospital provide King with a job where she was not required to spend eight hours a day on her feet because she was manifesting early symptoms of "talonavicular osteoarthritis." The hospital responded that it did not have any positions open at that time "that would limit the number of hours on her feet" but that jobs would be posted as they opened. In deposition testimony given in this case, King explained that she made her application for disability benefits because she had become "physically unable there at the hospital" or, as she corrected her statement, "Well, I guess it was after I was discharged from the hospital. . . . I guess it was about in '87, because my legs was giving me problems."

While the record does not contain King's application for Social Security disability benefits, the Social Security Administration awarded disability benefits to her in December 1988, determining that she had been disabled as of September 2, 1987, a week before the termination of her hospital employment. In its notice of award, the Social Security Administration explained that "[t]he decisions we made on your claim are based on information you gave us" and that these decisions were made by "doctors and other trained personnel." It also advised King that her health might improve and that therefore her case would be reevaluated in three years. King continues to receive Social Security disability benefits, as well as a pension for early retirement from Thomas Memorial Hospital.

After the West Virginia Human Rights Commission provided King with a right to sue notice, she filed this action in a West Virginia state court, and the hospital removed the case to federal court. In her amended complaint, King alleged (1) age-based employment discrimination in violation of the West Virginia Human Rights Act, (2) breach of contract, (3) intentional infliction of emotional distress, and (4) interference with retirement benefits in violation of the federal

Employee Retirement Income Security Act (ERISA). The district court dismissed the last three counts because they were barred by the statute of limitations. On the age discrimination claim, the court applied judicial estoppel to bar King's assertion of a necessary element of her claim. The court concluded that King's "representation[s]" to the Social Security Administration concerning her disabled condition estopped her from maintaining her age discrimination claim, a claim which required her to prove that she was "able and competent to perform the services required" of her employment. W. Va. Code § 5-11-9(1). While King's application for Social Security benefits was not before the court, the court noted that in order to establish her Social Security claim, King had to represent that she had "a severe impairment that made her unable to do her previous work as of September 2, 1987." Moreover, the award itself indicates that it was based on information and medical evidence submitted by King. The court reasoned that King could not make the showing under the West Virginia Human Rights Act that she was "able and competent to perform the services required" and at the same time present a claim for disability benefits that she was "unable to perform her previous work," and noted, "[T]he circumstances of this case strongly suggest that plaintiff is merely 'blowing hot and cold as the occasion demands.'"

This appeal followed, challenging only the district court's entry of summary judgment against King on her West Virginia age discrimination claim.

II

To establish a claim for unlawful age discrimination under West Virginia law, a claimant must demonstrate, among other matters, that she "is able and competent to perform the services required" of her employment with or without accommodation. W. Va. Code § 5-11-9(l); *see also Morris Memorial Convalescent Nursing Home, Inc. v. West Virginia Human Rights Comm'n*, 431 S.E.2d 353, 357-58 (W. Va. 1993). This requirement is consistent with the West Virginia Human Right Act's preference for injunctive relief and reinstatement. *See* W. Va. Code § 5-11-13(c). In this case, the district court determined that King was judicially estopped from satisfying the "able and competent to perform" requirement because she took the inconsistent

position before the Social Security Administration that she was disabled and could not perform her previous job. The court inferred, based on the Social Security Administration's decision, that "plaintiff not only made the representation that she had a severe impairment that made her unable to do her previous work as of September 2, 1987, but that she also submitted medical evidence in support of that representation."

Challenging that ruling on appeal, King contends that the district court erred because it failed to recognize that a Social Security disability finding reflected not her inability to perform her job as a dietary aide, but rather her "unemployability due to her age, limited work skills, education, and incapability due to arthritic feet and legs." She argues that there is nothing factually or legally inconsistent about her asserting both that she was able to meet the requirements of her job at the time of her termination, as required under the West Virginia Human Rights Act, and also that she became disabled one week prior to her termination for purposes of receiving Social Security disability benefits.

Before addressing whether King in fact took inconsistent positions before the Social Security Administration and in her state discrimination claim in this case, we should review the applicable principles of judicial estoppel, upon which the district court relied.

Judicial estoppel, an equitable doctrine that prevents a party who has successfully taken a position in one proceeding from taking the opposite position in a subsequent proceeding, is recognized to protect the integrity of the judicial system. *See Lowery v. Stovall*, 92 F.3d 219, 223 (4th Cir. 1996) ("'The purpose of the doctrine is . . . to protect the essential integrity of the judicial process'" (quoting *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 28-29 (4th Cir. 1995)); *McNemar v. Disney Store, Inc.*, 91 F.3d 610, 616 (3d Cir. 1996) ("The doctrine . . . serves a consistently clear and undisputed jurisprudential purpose: to protect the integrity of the courts"); *DeGuiseppe v. Village of Bellwood*, 68 F.3d 187, 191-92 (7th Cir. 1995) ("[C]ourts are under no compulsion to heed the shifting theories of 'chameleonic litigants'"). Acting on the assumption that there is only one truth about a given set of circumstances, the courts apply judicial estoppel to prevent a party from benefiting itself by maintain-

ing mutually inconsistent positions regarding a particular situation. As we have previously observed, the doctrine is invoked to prevent a party from "playing fast and loose with the courts," from "blowing hot and cold as the occasion demands," or from attempting "to mislead the [courts] to gain unfair advantage." *Lowery*, 92 F.3d at 223, 225 (citations omitted). As an equitable doctrine, judicial estoppel is invoked in the discretion of the district court and with the recognition that each application must be decided upon its own specific facts and circumstances. *See, e.g., McNemar*, 91 F.3d at 617.

We have recognized the necessity of establishing at least three elements to apply the doctrine: (1) The party to be estopped must be asserting a position that is factually incompatible with a position taken in a prior judicial or administrative proceeding; (2) the prior inconsistent position must have been accepted by the tribunal; and (3) the party to be estopped must have taken inconsistent positions intentionally for the purpose of gaining unfair advantage. *See Lowery*, 92 F.3d at 224; *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 29 (4th Cir. 1995); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166-67 (4th Cir. 1982). But judicial estoppel will not be applied where the party's inconsistent positions resulted from inadvertence or mistake. *See Lowery*, 92 F.3d at 224; *Clark Co.*, 65 F.3d at 29.

In this case, West Virginia law requires King to establish as part of her age discrimination case that she was "able and competent" to perform the services required of her employment as a dietary aide at Thomas Memorial Hospital. The question presented, therefore, is whether she was properly estopped from establishing that element by reason of the position she took before the Social Security Administration in making a claim for disability benefits.

The record reveals that during the year before her discharge from the hospital, King was suffering from early stages of osteoarthritis, making it difficult for her to stand for long periods of time, as was necessary in performing her work as a dietary aide. The hospital advised her that it could not accommodate her claimed need to spend less time on her feet, but it suggested she could apply for a suitable position when one became available. Following her discharge in September 1987, King filed a claim with the Social Security Administration for disability benefits based on this disability, and the Social

Security Administration awarded her benefits based on the information King provided, effective one week before her discharge.

The Social Security Administration's finding of disability necessarily meant that it had found, based on information supplied by King, that King was unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." 42 U.S.C. § 423(d)(1)(A). More specifically, the Social Security Act directs that "[a]n individual shall be determined to be under a disability only if [her] physical or mental impairment or impairments are of such severity that [she] is *not only unable to do [her] previous work* but cannot, considering [her] age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. 423(d)(2)(A) (emphasis added). The burden of proof lies with the claimant, who "shall not be considered to be under a disability unless [she] furnishes such medical and other evidence of the existence thereof as the Commissioner of Social Security may require. . . . Objective medical evidence of pain or other symptoms established by medically acceptable clinical or laboratory techniques . . . must be considered in reaching a conclusion as to whether the individual is under a disability." 42 U.S.C. § 423(d)(5)(A).

King makes the argument that a Social Security Administration finding of disability could be based on a more general finding of unemployability due to her age, limited work skills, education, and incapacity due to her arthritic feet and legs. The age, skills, and education factors, however, relate only to whether King could engage in "any other kind of substantial gainful work which exists in the national economy." To award King disability benefits, the Social Security Administration would necessarily have had to conclude first that King was "unable to do [her] previous work," either because of a physical or a mental impairment.

Moreover, in this case, there is no mystery about the basis of King's disability. She explained in deposition the position she took before the Social Security Administration, testifying that she was disabled because of arthritis in her legs at the time of her discharge. She stated repeatedly that she was not "physically able to work," that "I really become physically unable there at the hospital," and that she

became "unable to work from a physical standpoint . . . after I was discharged from the hospital." In addition, even though the Social Security Administration's award to King provided for a review of her condition after three years, at the time of her deposition eight years after her discharge from the hospital, King was still receiving disability benefits.

The pertinent facts may thus be summarized: (1) King has taken the position before the Social Security Administration that she was physically unable to do her previous job as a dietary aide; (2) she claimed that she became so disabled around the time of her discharge in September 1987; (3) the Social Security Administration necessarily determined that she was "unable to do her previous work" at Thomas Memorial Hospital; (4) based on her representations, she benefited herself by obtaining from the Social Security Administration an award of disability benefits; and (5) she continues to assert under oath that she was disabled and she continues to receive disability benefits, which indicate that her position was deliberately and not inadvertently taken. Upon these facts, we agree with the district court that King is judicially estopped from asserting, as required for her West Virginia age discrimination claim, that she was "able and competent" to perform her previous work at the hospital at the time of her discharge. *See* W. Va. Code § 5-11-9(1). To allow King to obtain benefits from two sources based on two incompatible positions, simply because the positions aid her claims for remuneration, would reduce truth to a mere financial convenience and would undermine the integrity of the judicial process. In the factual circumstances of this case, we conclude that the district court was well within its discretion in applying judicial estoppel to preclude King from asserting a necessary element of her West Virginia age discrimination case.

III

In addition to the requirement that King demonstrate that she was "able and competent" to work at her employment to prove an age discrimination case under West Virginia law, she must establish that "but for" her age (58), she would not have been fired. *See Conaway v. Eastern Associated Coal Corp.*, 358 S.E.2d 423, 429 (W. Va. 1986). To satisfy this requirement, and thereby shift the burden of production to the hospital, she would have to "show some evidence which would

sufficiently link the employer's decision and the plaintiff's status as a member of a protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion." *Id.* at 429-30 (footnote omitted); *see also Barefoot v. Sundale Nursing Home*, 457 S.E.2d 152, 161 (W. Va. 1995) (explaining that "but for" test is "merely a threshold inquiry, requiring only that a plaintiff show an inference of discrimination").

The only evidence on this issue that King offered was a paper in longhand from her personnel file on which calculations were made in March 1987 showing that the amount of her pension at her early retirement date of May 1, 1987, was less than half of the pension that she would receive at her normal retirement date on May 1, 1994. King states that she did not request that information and that it was prepared without her knowledge. The inference she seeks to draw from the existence of these calculations is that the hospital discharged her six months later because it wanted to reduce its future pension liabilities.

We fail to appreciate how these calculations, made in March 1987, are linked through any evidence to the decision to fire King in September 1987. But even if this evidence shifted the burden to the hospital to produce a valid, nondiscriminatory reason for terminating King, *see Conaway*, 358 S.E.2d at 430, the hospital presented evidence that it discharged King for falsifying her time card on August 27, 1987, a fact that King admitted and which required, as a matter of preestablished policy, that she be discharged. When confronted with this evidence, King had to meet the ultimate burden of proving that the reason given by the hospital was "merely a pretext for discriminatory motive." *Conaway*, 358 S.E.2d at 430 (footnote omitted).

King argues that the affidavit of a former co-worker, which she offered in opposition to summary judgment, established that it was hospital policy to allow employees a "grace period" of five to seven minutes at the start and finish of each workday and that therefore there must have been some other reason for her discharge. This affidavit reported that the former employee had observed food production employees sign out and leave work five to ten minutes earlier than the scheduled quitting time, and stated that this grace period was provided as part of a "long standing formal and later informal hospital

and dietary department policy." This affidavit, however, does not indicate that Thomas Memorial Hospital tolerated the *falsification of time records*. On the contrary, the evidence showed that the falsification of time records was a serious violation, requiring dismissal of the falsifying employee. Moreover, the hospital presented uncontradicted testimony that at least 15 other employees who had falsified their time records were discharged from their employment at the hospital, and only one of these other discharged employees was 40 years of age or older.

In short, we conclude that no reasonable jury could find that King's termination was the result of unlawful age-based discrimination on the part of the hospital.

For the reasons given herein, the judgment of the district court is hereby affirmed.

AFFIRMED

Supreme Court, U.S.
FILED

(2) 981394 JAN 28 1999

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

APPEAL NO. 97-1075

Kermie M. King

Plaintiff-Appellant

v.

Herbert J. Thomas Memorial Hospital Association

Defendant-Appellee

SUPPLEMENTAL APPENDIX

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28pp

TABLE OF CONTENTS

APPENDIX

A. Memorandum Order August 22, 1996

B. Memorandum Order December 11, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

KERMIE M. KING,

Plaintiff

V. Civil Action No. 2:95-0252

HERBERT J. THOMAS MEMORIAL
HOSPITAL ASSOCIATION, a
non-profit West Virginia corporation,

Defendant

MEMORANDUM ORDER

This matter is before the court on the motion for summary judgment filed by defendant Herbert J. Thomas Memorial Hospital Association on December 26, 1995.

The following facts are not in dispute.

Plaintiff was employed by defendant hospital as a dietary aid for approximately twenty-five years until she was terminated on September 9, 1987, at the age of 58. The termination was based on events which occurred on August 27, 1987. On that date, a fellow employee, Dee Bartoe, reported that plaintiff left the department at 2:20 p.m. and was observed getting into a vehicle and leaving the hospital grounds at 2:26 p.m. with her husband. (Pl.'s Exs. 6 & 7.) Plaintiff was scheduled to work until 2:30 p.m. and, on her time card, signed out at 2:30 p.m.

(Pl.'s Ex. 8.) In a handwritten report dated September 9, 1987, and signed by Darlene Kestner and Dee Bartoe, it is stated that plaintiff was counseled on September 8, 1987, and "admitted to leaving the department early." (Pl.'s Ex. 7.) The report further states that plaintiff "also admitted to this (leaving early) on other occasions." (Id.)

Initially, plaintiff was warned on September 8, 1987, by Darlene Kestner, her immediate supervisor, and Margaret Eagloski, the department head, that any further occurrences would result in a three-day suspension and a requirement that she check with the supervisor on duty when signing out. (Pl.'s Ex. 6 & 7.) However, on September 9, 1987, defendant's personnel director, Donna Arbogast, talked with plaintiff about the discrepancy between the time written on her time card and the time she ceased work. Plaintiff admitted that she had left earlier than her time card indicated and had also done so on prior occasions. (Def.'s Ex. 4.) By way of explanation, she stated that she did so because she felt that others had done the same thing. (Def.'s Ex. 4.) Arbogast then converted the warning to a discharge on the basis of a provision in the employee handbook stating that the first offense of falsification of a time card would result in discharge. (Pl.'s Ex. 6; Def.'s Ex. 4.)

On November 2, 1987, shortly after her termination, plaintiff filed a charge of age discrimination with the West

Virginia Human Rights Commission. (Def.'s Ex. 2, King Dep. Ex. 8.) On April 5, 1988, the Commission made a determination of "No Probable Cause," and advised plaintiff of her right to appeal. (Def.'s Ex. 2, King Dep. Ex. 9.) On September 15, 1994, another determination of "No Probable Cause" was issued. (Def.'s Ex. 2, King Dep. Ex. 10.) By letter dated September 22, 1994, plaintiff sought administrative review. (Def.'s Ex. 2, King Dep. Ex. 11.) Administrative review was conducted and recommendation was made that the no probable cause finding be upheld. (Def.'s Ex. 2, King Dep. Ex. 12.) By letter dated January 15, 1995, plaintiff was informed of that determination and was also provided with a notice of right to sue and a notice of right to appeal by petitioning for court review of the order. (Def.'s Ex. 2, King Dep. Ex. 13.) At some point after her termination, plaintiff also sought and received disability benefits from the Social Security Administration. (King. Dep. at 11-13.)

This suit was commenced in the Circuit Court of Kanawha County, West Virginia, on March 9, 1995, more than seven years after plaintiff's termination but less than two months after plaintiff received a notice of right to sue on her age discrimination claim. The case was removed to this court on April 5, 1995. Thereafter, on January 12, 1996, plaintiff was granted leave to file an amended complaint to add a cause of action based on ERISA. The amended complaint contains four counts. Count I

alleges employment discrimination on the basis of age in contravention of West Virginia Code, section 5-11-9. Count II is a claim of wrongful discharge in breach of "written and/or oral contracts" in which defendant "covenanted expressly and implicitly to deal with [plaintiff] fairly and in good faith and to provide permanent employment terminable only for just cause." (Compl. ¶ 28.) Count III asserts the intentional infliction of emotional ham in connection with plaintiff's termination. In Count IV, plaintiff contends that defendant violated sections 502(a)(1)(B) and 502(c) of ERISA by discharging her for the purpose of interfering with her attainment of rights under an employee welfare benefit plan.

With respect to Count I, defendant asserts in its motion for summary judgment that plaintiff has failed to establish a prima facie case of age discrimination because she cannot show that but for her age, she would not have been terminated. As to Counts II, III and IV, defendant maintains that plaintiff has failed to establish claims for wrongful discharge, intentional infliction of emotional distress, and violations of ERISA. Moreover, says defendant, as to the claims made in Counts II, III and IV, they are barred by the applicable statutes of limitations. Defendant further contends that the doctrine of judicial estoppel precludes plaintiff from seeking wage loss damages for

the period of time that she has been paid Social Security disability benefits.

II.

A. Statutes of Limitations.

1. Count I Age Discrimination.

Defendant concedes that the plaintiff's Count I age discrimination claim was brought timely, the limitations period having been tolled during the period of time that plaintiff was proceeding before the West Virginia Human Rights Commission on that claim. See Conaway v. Eastern Associated Coal, 358 S.E.2d 423, 427 (W. Va. 1986). However, contrary to plaintiff's assertion, the statute of limitations was not tolled on her other claims. Id. (proceedings before Human Rights Commission does not toll the statute of limitations on other causes of action based on plaintiff's discharge).

2. Count II Wrongful Discharge.

In her summary judgment materials, plaintiff recasts her Count II wrongful discharge claim as being an age discrimination claim under the West Virginia Human Rights Act. (See Pl.'s

Response at 36-37.) Thus, to the extent that the Count II wrongful discharge claim is subsumed by the Count I age discrimination claim, it survives the statute of limitations challenge. However, insofar as Count II is characterized as a claim for wrongful discharge, it is barred by a two-year statute of limitations period. Stanley v. Sewell Coal Co., 285 S.E.2d 679, 683 (W. Va. 1981). To the extent that it is viewed as a claim for breach of contract, there is no showing of an express contract of emplo~rment and the statute of limitations on the breach of an implied contract is five years. W. Va. Code § 55-2-6. Count II is accordingly barred by the statute of limitations except insofar as it is recast and subsumed by plaintiff's Count I age discrimination claim.

3. Count III Intentional Infliction of Emotional Distress.

The statute of limitations for an intentional infliction of emotional distress claim is two years. Courtney v. Courtney, 437 S.E.2d 436, 442-43 (W. Va. 1993). Plaintiff's contention that her claim for intentional infliction of emotional distress is a continuing tort and that the harm continued through the December 1994 administrative review of her Human Rights age discrimination claim is not supportable. The Count III cause of action for intentional infliction of emotional distress accrued

at the time of discharge and is barred by the applicable statute of limitations.

4. Count IV ERISA Violation.

In Count IV, plaintiff contends that defendant discharged her in order to prevent her attainment of full benefits due under an employee welfare benefit plan in violation of sections 502(a)(1)(B) and 502(c) of ERISA. Section 502(a)(1)(B) provides for a cause of action to recover benefits due under an employee welfare benefit plan. 29 U.S.C.A. § 1132(a)(1)(B). Section 502(c), 29 U.S.C.A. § 1132(c), governs the refusal of a plan administrator to supply requested information. Neither section fits the conduct alleged by plaintiff. The court accordingly treats plaintiff's Count IV ERISA claim as being brought under section 501, 29 U.S.C.A. § 1140, which provides, inter alia, that it shall be unlawful to discharge an employee for the purpose of interfering with the attainment of rights due under an employee welfare benefit plan protected by ERISA.

Congress did not provide a statute of limitations for claims founded on section 501 of ERISA. Consequently, it is appropriate for the court to apply the statute of limitations of the most closely analogous state cause of action. E.g., Teumer v. General Motors Corp., 34 F.3d 542, 546-47 (7th Cir. 1994).

Defendant contends that the most closely analogous state cause of action is West Virginia's two year statute of limitations for retaliatory discharge. Plaintiff takes the position that the appropriate borrowing statute is West Virginia's statute of limitations for fraud and that her Count IV cause of action did not accrue until September 1994, at the earliest, when she discovered the full extent of her loss of benefits.

The Court of Appeals for the Fourth Circuit has not addressed the question of what statute of limitations applies to a section 501 claim. Most circuit courts of appeal addressing the issue have found it appropriate to apply the statute of limitations for a state law cause of action for retaliatory/wrongful discharge, Teumer, 34 F.3d at 549-50; Byrd v. MacPapers, Inc., 961 F.2d 157, 159 (11th Cir. 1992); Hinton v. Pacific Enterprises, 5 F.3d 391, 394 (9th Cir. 1993), cert. denied, 114 S. Ct. 1833 (1994); or employment discrimination, Held v. Manufacturers Hanover Leasing Corp., 912 F.2d 1197, 1205 (10th Cir.); Gavalik v. Continental Can Co., 812 F.2d 834, 843 (3d Cir.), cert. denied, 484 U.S. 979 (1987); see also McClure v. Zoecon, Inc., 936 F.2d 777, 778-79 (5th Cir. 1991) (applying single statute of limitations for employment discrimination and wrongful discharge). Contra, Heideman v. PFL, Inc., 904 F.2d 1262, 1267 (8th Cir. 1990), cert. denied, 498 U.S. 1026 (1991)

(applying contract statute of limitations); Clark v. Coats & Clark, Inc.,, 865 F.2d 1237, 1242 (11th Cir. 1989) (applying statute of limitations for statutory rights and recovery of wages).

Plaintiff has cited no authority for the proposition that fraud is the state-law cause of action most closely analogous to her section 510 claim and the weight of authority supports application of the statute of limitations for retaliatory/wrongful discharge. On the basis of the weight of authority, the court concludes that West Virginia's two-year statute of limitations for retaliatory discharge, Stanley v. Sewell Coal Co., 285 S.E.2d 679, 683 (W. Va. 1981), should be applied to plaintiff's section 510 claim and that it is, accordingly, barred.

B. Age Discrimination.

Under section 5-11-9 of the West Virginia Human Rights Act, plaintiff must first make a prima facie case of employment discrimination by proving that:

(1) Plaintiff is a member of a protected class;

(2) The employer made an adverse decision concerning plaintiff; and

(3) But for the plaintiff's protected status, the adverse decision would not have been made.

Conaway v. Eastern Associated Coal Corp., 358 S.E.2d 423, 429 (W. Va. 1986).

To prove the third prong of the test, plaintiff must make some showing that "would sufficiently link the employer's decision and the plaintiff's status as a member of a protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion." Id. at 429-30. In the absence of an admission of the employer, the evidence could come in the form of a showing of unequal or disparate treatment, the elimination of apparent legitimate reasons for the decision, or, in a large operation, statistical evidence showing that members of the protected class received substantially worse treatment than others. Id. at 430.

If the plaintiff makes a prima facie showing, the burden shifts to the employer to show some nondiscriminatory reason for the decision. Id. Once such a showing is made, the plaintiff has the opportunity to rebut the employer's evidence with a showing that the stated reason was merely pretextual and that discriminatory motive was the true reason for its actions. Id.

Here, it is conceded that plaintiff can prove the first two requirements of her prima facie case. As to the remaining requirement, plaintiff contends that there was a long-standing, albeit unwritten, policy that employees had a five to seven minute grace period within which to sign in and out. (Pl.s Dep. at 37-39.) Her testimony is supported by the affidavit of Harry B. Roberts, a co-worker, who avers that he personally observed other employees sign out and leave work five to ten minutes earlier than their scheduled quitting times and that their action was in accordance with a long-standing policy and practice which permitted a grace period for arrival and departure times. (Pl.'s Ex. 5, Roberts Aff. ¶ 2.) King has thus come forward with evidence which is contrary to the testimony of Arbogast to the effect that every other employee who Committed the offense of falsifying time cards was likewise discharged in accordance with the written handbook policy.

Inasmuch as there is evidence of a grace period which contradicts defendant's evidence of strict adherence to a no falsification policy and which would explain plaintiff's conduct in signing out early on August 27, 1987, there is evidence which tends to eliminate defendant's apparent legitimate reason for discharging plaintiff and to render pretextual its proffered nondiscriminatory reason for its decision. Thus, it cannot be said that plaintiff cannot prove a prima facie case of age

discrimination or that she cannot demonstrate the pretextual nature of defendant's stated nondiscriminatory reason for her discharge.

Defendant's motion for summary judgment on plaintiff's Count I age discrimination claim must be denied.

C. Judicial Estoppel.

Plaintiff testified that she is not now physically able to work and has not been physically able to work since "about" 1987, after her discharge by the defendant. (King. Dep. at 10-11.) She also testified that she receives Social Security disability payments. (King Dep. at 12.) On the basis of that testimony, defendant contends that plaintiff is judicially estopped from claiming wage loss damages in this action for the period of time that she received Social Security disability benefits.

The same issue has more recently been raised by the defendant in a motion in limine filed on August 9, 1996. It is noted that the motion in limine is accompanied by documentation, not earlier provided, in the form of a Social Security disability benefits award letter, which will be helpful to the court in deciding the judicial estoppel issue. It is further noted that the Fourth Circuit Court of Appeals has very recently addressed

its formulation of the doctrine of judicial estoppel in Lowery v. Stovall, to be published at ___ F.3d. ___, No. 95-1729 (4th Cir. Aug. 6, 1996).

Inasmuch as there is supplemental factual information and legal authority that should be considered by the court in ruling on the judicial estoppel issue, the court deems the matter more appropriately addressed in the context of the motion in limine filed by defendant on August 9, 1996. Insofar as defendant seeks partial summary judgment on the ground of judicial estoppel, the motion will be denied without prejudice to development of the matter in the context of the pending motion in limine.

III.

For the reasons stated, it is **ORDERED** that:

1. The motion of defendant Herbert J. Thomas Memorial Hospital Association for summary judgment be, and it hereby is, granted insofar as it is directed to plaintiff's Count II claim for wrongful discharge, her Count III claim for intentional infliction of emotional distress, and her Count IV claim for violation of ERISA.

2. The motion of defendant Herbert J. Thomas Memorial Hospital Association for summary judgment be, and it hereby is, denied insofar as it is directed to plaintiff's Count I age discrimination claim.

3. Insofar as the motion of defendant Herbert J. Thomas Memorial Hospital Association for summary judgment is based on the doctrine of judicial estoppel, the motion be, and it hereby is, denied without prejudice to development of the issue in the context of defendant's August 9, 1996, motion in limine based on that same argument, a briefing schedule for which will be separately set by the court.

The Clerk is directed to forward copies of this order to all counsel of record.

DATED: August 22, 1996

/s/_____
JOHN T. COPENHAVER, JR.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

KERMIE M. KING,

Plaintiff

V. Civil Action No. 2:95-0252

HERBERT J. THOMAS MEMORIAL
HOSPITAL ASSOCIATION, a
non-profit West Virginia corporation,

Defendant

MEMORANDUM ORDER

By order entered on August 22, 1996, the court, inter alia, granted summary judgment in favor of the defendant on all of plaintiff's claims except for the Count I age discrimination claim brought under the West Virginia Human Rights Act, W. Va. Code §§ 5-11-1 through 5-11-19. Summary judgment on that claim was denied without prejudice to further development of defendant's judicial estoppel argument in the context of defendant's motion in limine, filed on August 9, 1996,[1] and after giving the parties further opportunity to brief the issue.

---

[1]Defendant's August 9, 1996, motion in limine sought to invoke the doctrine of judicial estoppel to preclude plaintiff from offering evidence of economic loss after September 2, 1987, the date on which she was found to be totally disabled for the purpose of receiving social security disability benefits.

Thereafter, on August 23, 1996, defendant filed a document captioned "DEFENDANT HERBERT J. THOMAS MEMORIAL HOSPITAL ASSOCIATION'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE EVIDENCE OF DAMAGES AND MOTION FOR SUMMARY JUDGMENT." In that document, defendant asserted that the doctrine of judicial estoppel also bars plaintiff from pursuing her age discrimination claim and asked, inter alia, that the court grant judgment in its favor on the age discrimination claim on the basis of its judicial estoppel argument. (Def.'s Supp. Mem. & Mot. Summ. J. at 1, 8.) In response, plaintiff contends in the alternative that defendant's August 23, 1996, submission is either an untimely motion for summary judgment or a motion for reconsideration. She asks the court to .strike the "untimely motion for summary judgment," or to deny it. (Pl.s' Resp. at 4, 15.)

To the extent that plaintiff seeks to strike the supplemental filing as an untimely motion for summary judgment, her position is not well taken inasmuch as the denial of summary judgment on the Count I claim on the ground of judicial estoppel was without prejudice. The parties having treated defendant's submission of August 23, 1996, as one seeking summary judgment, the court accordingly turns to the merits of defendant's contention that the doctrine of judicial estoppel entitles it to

summary judgment in its favor on plaintiff's Count I age discrimination claim.

In that regard, there is no dispute but that plaintiff was terminated from employment on or about September 9, 1987; that she was notified on December 12, 1988, that she was eligible for social security disability benefits as of September 2, 1987, one week before her discharge; and that she continues to date to receive those benefits. Inasmuch as plaintiff succeeded in persuading the Social Security Administration that she was unable to work at the time of her discharge, defendant'contends that she is estopped from asserting a contrary position in this action. Plaintiff counters, without evidentiary support, that the doctrine of judicial estoppel is not applicable because the favorable social security decision rested on her advanced age and inability to find new employment,' not on her inability to work. She also asserts, through the argument of counsel, that her receipt of unemployment benefits and her efforts to obtain new employment after her discharge at the very least create an issue of fact about whether, at the time of her termination, she was able to perform her duties.

I ·

The doctrine of judicial estoppel is designed to protect the integrity of the judicial process by "prevent[ing] a

party from playing fast and loose with the courts." Lowery v. Stovall, 92 F.3d 219, 223 & n.3 (4th Cir. 1996) (quoting John S. Clark Co. v. Faggert & Frieden, P.C., 65 F.3d 26, 28-29 (4th Cir. 1995)). The doctrine thus "precludes a part from adopting a position that is inconsistent with a stance taken in prior litigation." Id.

Judicial estoppel, as formulated by the Fourth Circuit Court of Appeals, is to be applied with caution and requires a finding that three elements have been met. Id. at 223-24. First, the party against whom the doctrine is to be applied must be asserting a position that is inconsistent with a position taken in prior litigation,[2] and the "position sought to be estopped must be one of fact rather than law or legal theory." Id. at 224 (citations omitted). The second element is that "the prior inconsistent position must have been accepted," id. (citing Teledyne Indus., Inc. v. NLRB, 911 F.2d 1214, 1218 (6th Cir. 1990); Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 (4th Cir. 1982)); that is, the first tribunal must have adopted the position urged as part of a final disposition, id. at 224-25 (citing

[2]Administrative and quasi-judicial proceedings such as those conducted before the Social Security Administration are prior litigation for purposes of judicial estoppel. Simo v. Home Health & Hospice Care, 906 F. Supp. 714, 718 (D.N.H. 1995); Muellner v. Mars, Inc., 714 F. Supp. 351, 356-60 (N.D. Ill. 1989); see DeGuiseppe v. Village of Bellwood, 68 F.3d 187, 191 (7th Cir. 1995); UNUM Corp. v. United States, 886 F. Supp. 150, 158 (D. Me. 1995).

Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 n.5 (6th Cir. 1982)).

The third and determinative element is a finding that the party sought to be estopped "'intentionally mislead the court to gain unfair advantage.'" Id. (quoting Tenneco Chems., Inc. v. William T. Burnett & Co., 691 F.2d 658, 665 (4th Cir. 1982)). Consequently, judicial estoppel does not apply when the prior position was "based on inadvertence or mistake." Id. (quoting Faggert & Frieden, 65 F.3d at 29). However, when it is apparent that a party is "'blowing hot and cold as the occasion demands' or wanting 'to have [his] cake and eat it too,'" one may conclude that he is intentionally attempting to mislead the court and gain an unfair advantage. Id. at 225. He may be estopped from doing so inasmuch as the law need not tolerate a party swearing to both the truth and the untruth of the same matter. Id. (citing People v. Goestenkors, 662 N.E.2d 574, 577 (Ill. App. Ct. 1996).

Although the Fourth Circuit Court of Appeals has not had occasion to address the applicability of the doctrine of judicial estoppel under analogous circumstances, a number of courts in other jurisdictions have applied the doctrine and estopped a plaintiff from pursuing an. employment discrimination claim when there has been a prior determination of inability to perform necessary job functions at the time employment ceased. McNemar v. Disney Store, Inc., 91 F.3d 610, 616-19 (3d Cir. 1996)

(in light of sworn statements in applications for state and social security disability benefits of total and permanent disability predating his termination, plaintiff was estopped in claims under the Americans with Disabilities Act (ADA) and a similar New Jersey Law Against Discrimination from asserting that he was able to do his job at the time of discharge); Griffith v. Wal-Mart Stores, Inc., 930 F. Supp. 1167, 1173-74 (E.D. Ky. 1996) (in light of plaintiff's representations of total disability in application for and receipt of social security disability benefits, he was estopped in ADA claim from asserting that he was able to perform the essential functions of his job at the time of discharge); Garcia-Paz v. Swift Textiles, Inc., 873 F. Supp..547, 554-56 (D. Kan. 1995) (plaintiff judicially estopped from pursuing claim underADA by virtue of statements in connection with obtaining long-term disability insurance and social security disability benefits to effect that she was totally disabled from performing her job duties on the date of her termination); Muellner v. Mars, Inc., 714 F. Supp. 351, 355-60 (N.D. Ill. 1989) (plaintiff's successful representation of total disability to the Social Security Administration and her continuing receipt of disability benefits estopped her from asserting under her retaliatory discharge claim that she was capable of performing the duties of her job); see also Cline v. Western Horseman, Inc., 922 F. Supp. 442, (D. Colo. 1996) (as a matter of law, plaintiff is estopped from claiming under ADA that she was able to perform the

essential functions of her job while at the same time receiving social security disability benefits and, as a matter of fact, her receipt of disability benefits precludes a finding that there is a genuine issue of fact as to whether she could perform the essential functions of her job at the time of her discharge), cf. DeGuiseppe v. Village of Bellwood, 68 F.3d 187, 191 (7th Cir. 1995) (inasmuch as he testified before the pension board that he was disabled and submitted supporting reports from two physicians, plaintiff was estopped in retaliatory discharge action from asserting that he was not disabled).

Other courts reach the same result without invoking estoppel principles. E.g., Kennedy v. Applause, Inc., 90 F.3d 1477 (9th Cir. 1996) (inasmuch as plaintiff represented on state disability benefit and Social Security Administration claim forms that she was "completely disabled for all work-related purposes," there was no genuine issue that she could perform her job, an essential element of her claim under the ADA); August v. Offices Unlimited, Inc., 981 F.2d 576, 580-84 (1st Cir. 1992) (plaintiff who applied for and received total disability insurancebenefits could not meet his burden of demonstrating under the ADA that he could have performed his job if his handicap had been accommodated); Hatfield v. Quantum Chem. Corp., 920 F. Supp. 108, 110-11 (S.D. Tex. 1996) (plaintiff's representation of total disability in application for and receipt of insurance and social security

disability benefits sufficient for a finding that he was unable to perform the essential functions of his job and thus could not prevail on his ADA claim); Smith v. Midland Brake, Inc., 911 F. Supp. 1351, 1356-63 (D. Kan. 1995) (in light of plaintiff's representation of total disability in application for and receipt of social security disability benefits, no reasonable jury could find in his favor on employment discrimination and retaliatory discharge claims which required a showing of ability to perform his job and, thus, summary judgment in favor of the defendant was appropriate); Reigel v Kaiser Foundation Health Plan of N.C., 859 F. Supp. 963, 967-70 (E.D.N.C. 1994) (in light of evidence of plaintiff's representations of total and permanent disability in applications for total disability benefits, she failed to demonstrate ability to perform the essential functions of her job, an essential element of her ADA claim). But cf. Overton v. Reilly, 977 F.2d 1190, 1196 (7th Cir. 1992) (a Social Security Administration finding of disability is not necessarily inconsistent with an asserted ability to do one's job where it is shown that the award was based on a "finding that the claimant meets the criteria for a listed disability without inquiry into his ability to find work within the economy").

II.

For social security disability purposes, "disability" is defined as:

> [T]he inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. To meet this definition, you must have severe impairment, which makes you unable to do your previous work or any other substantial gainful activity which exists in the national economy. To determine whether you are able to do any other work, we consider your residual functional capacity and your age, education, and work experience.

20 C.F.R. § 404.1505. Regulations describing what ~s necessary to show an impairment provide:

> If you are not doing substantial gainful activity, we always look first at your physical or mental impairment(s) to determine whether you are disabled or blind. Your impairment must result from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques. A physical or mental impairment must be established by medical evidence consisting of signs, symptoms, and laboratory findings, not only by your statement of symptoms ....

20 C.F.R. § 404.1508.

Applying those regulations, the Social Security Administration advised plaintiff in a notice of award dated December 12, 1988, that she was entitled to benefits and that it was determined that she "became disabled on 9/02/87," (Def.'s Mot. Summ. J. Ex. 2), one week prior to her discharge by defendant. The notice advises plaintiff that her case will be reviewed in approximately three years inasmuch as "[t]he doctors and other trained personnel who decided that you are disabled believe that your health may improve." (Id.) The notice further states that "[t]he decisions we made on your claim are based on information you gave us."

On the basis of the information contained in the notice of award, the only reasonable inference is that plaintiff not only made the representation that she had a severe impairment that made her unable to do her previous work as of September 2, 1987, but that she also submitted medical evidence in support of that representation. Indeed, plaintiff has come forward with no evidence to support the unsubstantiated argument of counsel that the finding of disability was based on a consideration of plaintiff's inability to do other work based on such factors as her age. The court accordingly concludes that plaintiff successfully represented to the Social Security Administration that as of September 2, 1987, she was disabled and unable to perform her previous work.

In determining whether plaintiff's position before the Social Security Administration is inconsistent with a position necessarily taken in this action, it is seen that in order to prevail on her age discrimination claim under the West Virginia Human Rights Act, W. Va. Code §§ 5-11-1 through 5-11-19, plaintiff must prove that at the time of defendant's allegedly discriminatory action (her discharge), she was "able and competent to perform the services required" of her employment. W. Va. Code § 5-11-9(1). She cannot make that showing without contradicting the position she successfully asserted in receiving social security disability benefits. The inconsistent position is one of fact (inability versus ability to perform her duties at the hospital) and it was adopted by the Social Security Administration in making a final determination on plaintiff's eligibility for benefits and in setting September 2, 1987, as the date on which she became disabled. The first two elements of the doctrine of judicial estoppel are satisfied.

As to the third element, there is no basis for finding that plaintiff's prior representation of disability prior to September 9, 1987, was based on inadvertence or mistake. Rather, the circumstances of this case strongly suggest that plaintiff is merely "'blowing hot and cold as the occasion demands." Having persuaded the Social Security Administration that she has been unable since September 2, 1987, to perform her duties at the

hospital, she now seeks the opportunity to persuade the trier of fact in this action that she was "able and competent to perform" those services on September 9, 1987. As the Fourth Circuit Court of Appeals noted, the law need not tolerate a party "wanting to 'have [his] cake and eat it too.'" Lowery, 92 F.3d at 225. The court is satisfied that plaintiff's allegation here that she was able to perform her duties at the time of her discharge is nothing more than an intentional intent to mislead the court to gain an unfair advantage in this litigation. The third and determinative element required for judicial estoppel is met.

Inasmuch as the elements necessary for application of the doctrine of judicial estoppel are present in this action, and consistent with the holdings of the majority of courts applying the doctrine in analogous situations, the court finds that plaintiff is estopped from representing to this court that she was able and competent to perform the services required of her by the defendant at the time of her discharge on September 9, 1987. She is accordingly unable to establish an essential element of her Count I age discrimination claim under the West Virginia Human Rights Act. Defendant is thus entitled to summary judgment on the remaining Count I age discrimination claim.

III.

For the reasons stated, it is **ORDERED** that defendant's motion for summary judgment on plaintiff's Count I age discrimination claim be, and it hereby is, granted.

The Clerk is directed to forward copies of this order to all counsel of record.

DATED: December 11, 1996

/s/ John T. Copenhaver, Jr.
JOHN T. COPENHAVER, JR.
United States District Judge

(3)

Supreme Court, U.S.
FILED
MAR 29 1999
OFFICE OF THE CLERK

No. 98-1394

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

KERMIE M. KING,

Petitioner,

v.

HERBERT J. THOMAS MEMORIAL HOSPITAL ASSOCIATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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3488

STATEMENT PURSUANT TO RULE 29.6

Herbert J. Thomas Memorial Hospital Association is a non-stock, tax exempt, not for profit corporation. It has no parent corporation, but has two sister corporations which include Health Care Connection, Inc., a non-stock, not for profit, taxable medical corporation, and Thomas Memorial Hospital Foundation, a non-stock, not for profit corporation. Herbert J. Thomas Memorial Hospital Association has two wholly owned subsidiary corporations, Thomas Valuecare Inc. which is a not for profit corporation, and TMH Services, Inc. which is a for profit corporation. In turn, TMH Services, Inc. has six nonwholly owned for profit subsidiary businesses, which include Ashton Partners, Bennett Partners, Division Street Partners, Homecare Connection, L.L.C., IBO Services, THP Partners, and TriQuest, Inc.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iii
Law Involved	1
Statement of the Case	1
Statement of Facts	4
Reasons for Denying the Writ	6
Conclusion	18

TABLE OF CITED AUTHORITIES

Page

Cases:

Aetna Life Ins. Co. of Hartford v. Haworth, 300 U.S. 227 (1937) 7

August v. Offices Unlimited, Inc., 981 F.2d 576 (1st Cir. 1992) 9

Budd v. ADT Sec. Systems, Inc., 103 F.3d 699 (8th Cir. 1996) 9

Cline v. Western Horseman, Inc., 922 F. Supp. 442 (D. Col. 1996) 11

Erit v. Judge, Inc., 961 F. Supp. 774 (D.N.J. 1997) . 9

Flast v. Cohen, 392 U.S. 83 (1968) 7

Fussell v. Georgia Ports Auth., 906 F. Supp. 1561 (S.D. Ga. 1995), *aff'd*, 106 F.3d 417 (11th Cir. 1997) .. 11

Gaddy v. Four B. Corp., 953 F. Supp. 331 (D. Kan. 1997) 17

Garcia-Paz v. Swift Textiles, Inc., 873 F. Supp. 547 (D. Kan. 1995) 9, 10

Harris v. Marathon Oil Co., 948 F. Supp. 27 (W.D. Tex. 1996) 9

Cited Authorities

	Page
Hindman v. Greenville Hosp. Sys., 947 F. Supp. 215 (D.S.C. 1996)	9
Johnson v. U.S. Steel Corp., 943 F. Supp. 1108 (D. Minn. 1996)	9
Lowery v. Stovall, 92 F.3d 219 (4th Cir. 1996), *cert. denied*, 519 U.S. 1113 (1997)	9, 10
McNemar v. The Disney Stores, Inc., 91 F.3d 610 (3d Cir. 1996)	9
Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986)	17
Miller v. U.S. Bancorp, 926 F. Supp. 994 (D. Or. 1996)	9
Nguyen v. IBP, Inc., 905 F. Supp. 1471 (D. Kan. 1995)	11
Pegues v. Emerson Elec. Co., 913 F. Supp. 976 (N.D. Miss. 1996)	11
Public Employees Retirement System v. Betts, 492 U.S. 158 (1989)	17
Reigel v. Kaiser Foundation Health Plan of North Carolina, 859 F. Supp. 963 (E.D.N.C. 1994)	10, 16

Cited Authorities

	Page
Ross v. Indiana State Teacher's Ass'n., 955 F. Supp. 1025 (N.D. Ind. 1997)	9
Shafer v. Preston Memorial Hosp. Corp., 107 F.3d 274 (4th Cir. 1997)	17
Simo v. Home Health & Hospice Care, 906 F. Supp. 714 (D.N.H. 1995)	16
Smith v. Midland Brake, Inc., 911 F. Supp. 1351 (D. Kan. 1995)	9
Taylor v. Food World, Inc., 946 F. Supp. 937 (N.D. Ala. 1996)	9
United States v. Evans, 213 U.S. 297 (1909)	7
Wells v. North Carolina Bd. of Alcohol Control, 714 F.2d 340 (4th Cir. 1983)	15
Williams v. Channel Master Satellite Sys., Inc., 101 F.3d 346 (4th Cir. 1996)	17
Statutes:	
29 U.S.C. § 621 *et seq.*	1, 2
29 U.S.C. § 1101 *et seq.*	2
42 U.S.C. § 423(d)(a)(A)	11

Cited Authorities

	Page
42 U.S.C. § 1983	1, 2
42 U.S.C. § 2000e *et seq.*	1, 2
W. Va. Code § 5-11-9 *et seq.*	1, 2
W. Va. Code § 5-11-9(1)	11, 17
Rules:	
Sup. Ct. R. 10(a)	8
Sup. Ct. R. 12(3)	4
Other Authorities:	
20 C.F.R. § 404.603 (1995)	14
20 C.F.R. § 404.703 (1995)	14
20 C.F.R. § 404.705 (1995)	14
20 C.F.R. § 404.900 (1995)	14
20 C.F.R. § 404.1505 (1995)	11

LAW INVOLVED

The law involved in this matter is the application of the doctrine of judicial estoppel to a claim of age discrimination under the West Virginia Human Rights Act, W. Va. Code § 5-11-9 *et seq.* This case does not involve, nor has petitioner ever pled, a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the Age Discrimination In Employment Act, 29 U.S.C. § 621 *et seq.*, or 42 U.S.C. § 1983.

STATEMENT OF THE CASE

The petitioner, Kermie Marie King ("King"), was discharged from employment with respondent, Herbert J. Thomas Memorial Hospital ("Thomas"), on September 9, 1987. King was discharged because she falsified entries on her time card in violation of Thomas' written policies.

On November 2, 1987, King filed a charge of age discrimination with the West Virginia Human Rights Commission. The Commission investigated the charge and on April 5, 1988, issued a determination that there was no probable cause to believe that King was discharged because of her age. For reasons unknown, the Commission issued another determination six years later. On September 15, 1994, the Commission again found no probable cause to believe that King had been discriminated against on the basis of her age. On September 22, 1994, King requested an administrative review of the no probable cause determination, which review was held on December 14, 1994. On January 15, 1995, the Commission affirmed the no probable cause determination and provided King with a notice of right to sue.

On March 15, 1995, King instituted a lawsuit against Thomas in the Circuit Court of Kanawha County, West Virginia. King asserted several causes of action, including age discrimination under the West Virginia Human Rights Act, W. Va. Code § 5-11-9 *et seq.*, wrongful discharge, and intentional infliction of emotional distress, but raised no claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the Age Discrimination In Employment Act, 29 U.S.C. § 621 *et seq.*, or 42 U.S.C. § 1983. Based upon allegations in the complaint that Thomas discharged King for the purpose of interfering with the attainment of retirement benefits, Thomas removed the matter to the United States District Court for the Southern District of West Virginia on April 5, 1995, upon the grounds that the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1101 *et seq.*, preempted King's state law claims.

By Memorandum Order dated August 22, 1996, the District Court granted in part Thomas' Motion for Summary Judgment. The court ruled that King's claims of wrongful discharge, intentional infliction of emotional distress, and ERISA violations were barred by the applicable statutes of limitations (Petitioner's Supplemental Appendix A). The court denied Thomas' motion as it related to King's age discrimination claims, and denied without prejudice Thomas' motion based on the doctrine of judicial estoppel, pending further briefing (*Id.*).

On December 11, 1996, the District Court revisited the issue of whether King's age discrimination claim was barred by the doctrine of judicial estoppel. By Memorandum Order of that date, the District Court found that King was terminated from employment on September 9, 1987; that she applied for disability benefits from the Social Security Administration;

that on December 12, 1988, she was notified that she was eligible to receive those benefits retroactive to September 2, 1987, one week prior to her discharge; that she continues to date to receive those benefits; that in order to prevail upon her age discrimination claim under the West Virginia Human Rights Act she must prove that at the time of the alleged discriminatory action she was able and competent to perform the services required of her employment; and that the doctrine of judicial estoppel bars her from claiming that she was able to work at the same time she claimed to the Social Security Administration that she was unable to work. Thus, the District Court granted summary judgment to Thomas upon King's claims which had survived the August 27, 1996 order (Petitioner's Supplemental Appendix B).

King then appealed the latter decision to the United States Court of Appeals for the Fourth Circuit. By order dated October 30, 1998, the Fourth Circuit Court of Appeals ruled that the doctrine of judicial estoppel barred King from asserting in court that she was able and competent to perform the services required of her job at Thomas, a necessary prerequisite to an age discrimination claim under the West Virginia Human Rights Act, while at the same time successfully asserting to the Social Security Administration that she was disabled and thus unable to do her previous work at Thomas (Petition Appendix, pp. 5-9). Moreover, the Fourth Circuit Court of Appeals further ruled on the merits of King's age discrimination claim, concluding that no reasonable jury could find that King's discharge was the result of age discrimination on the part of Thomas (Petition Appendix, pp. 9-11).

King now seeks a writ of certiorari as to the Fourth Circuit Court of Appeals' application of the doctrine of judicial

estoppel, *but not* as to that court's decision on the merits of her age discrimination claim (*see, e.g.*, Petition, p. i). The case was placed on this Court's docket on March 2, 1999; however, to date petitioner has not complied with the notification requirements of the Rules of the Supreme Court of the United States, Rule 12(3).

STATEMENT OF FACTS

King was hired by Thomas in 1962. Her entire employment was in the Dietary Department where she performed duties such as working on the food tray line, delivering food trays to patients, filing cards in the office, etc. Also during the entirety of her employment her hours of work were 6:00 a.m. to 2:30 p.m.

On Saturday, August 27, 1987, King left the Dietary Department at 2:20 p.m., although she was scheduled to work until 2:30. King was seen by her supervisor, Darlene Kestner, getting into a truck and leaving the premises at approximately 2:26 p.m. Ms. Kestner then reviewed King's time card, upon which King had entered that she worked until 2:30.

On September 8, 1987, Ms. Kestner and the Department Head, Margaret Eagloski, met with King concerning her falsification of her time card. At that time, King was warned that any further such falsifications would result in a three-day suspension. This discipline, however, was not in accordance with established Hospital policy, which required termination for such an infraction.

Normally, the supervisor or department head writes up the infraction and the discipline, and brings it to the personnel

director for approval prior to presenting it to the employee. In this case, the discipline was given to King prior to approval by Donna Arbogast, the Personnel Director, and subsequently given to Ms. Arbogast. At that time, Kestner was new in her supervisory position and Eagloski was in an acting capacity as the Director of the Dietary Department. Moreover, Kestner and Eagloski were not employees of the Hospital, but rather were employees of ARA, a company which provided a management contract for dietary services at the Hospital.

When the disciplinary action was presented to Ms. Arbogast, she immediately changed it to conform with Hospital policy. The Employee Handbook issued to all employees, including King, specifically provides that the *first offense* of falsification of a time card carries the penalty of discharge. Furthermore, the Hospital's Policy for Recording Time Worked and Instructions for Time Card Recording provides in pertinent part: "*RECORD THE ACTUAL TIME WHEN COMMENCING WORK AND THE ACTUAL TIME WHEN CONCLUDING WORK. (FALSIFICATION OF TIME CARD WILL RESULT IN TERMINATION)*" (emphasis in original). This policy was kept in the front of every time card book in the Hospital, and was in the time card book upon which King signed her time out on August 27, 1987.

Consequently, Ms. Arbogast met with King, Kestner, and Eagloski on September 9, 1987. At that meeting, Ms. Arbogast confronted King, who admitted that she had left prior to 2:30 but marked her time card as if she had left at 2:30. Moreover, King admitted that she had done this on other occasions. Therefore, Ms. Arbogast informed King that there had been a falsification of her time card and that immediate termination was proper at that point. King was fully aware

that falsifying a time card was grounds for discharge, and she was in fact discharged solely for this reason.[1]

King became physically unable to work while she was still employed at Thomas or shortly thereafter. She filed a claim for disability benefits with the Social Security Administration, which claim was approved on December 12, 1988. At that time, the Social Security Administration determined that King became disabled on September 2, 1987, one week prior to her discharge. King has continued to receive Social Security disability benefits to the present.

REASONS FOR DENYING THE WRIT

A. The Fourth Circuit Court of Appeals decided this case of alleged age discrimination on two separate bases: (a) the application of the doctrine of judicial estoppel to a claim of age discrimination arising under the West Virginia Human Rights Act, which King asserts to be error (Petition Appendix, pp. 5-9); and (b) King's failure to produce sufficient evidence to give rise to an inference of age discrimination under West Virginia law, or to produce sufficient evidence that Thomas' asserted valid nondiscriminatory reason for King's discharge was pretextual (Petition Appendix pp. 9-11), which King does not raise as an assignment of error (*see, e.g.*, Petition, p. i).

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1. Not only was King discharged for falsification of her time card, every other individual who committed this infraction of Hospital policy has likewise been discharged. These include, in addition to King, Tamalena Stover (age 19), Roberta Mann (age 25), Cheryl Miller (age 23), Allan Gurley (age 35), Paul Newman (age 31), Nila Bird (age 35), George Baria (age 33), Kristina Riffee (age 22), Ann Taylor (age 32), Leigh Roberts (age 28), Bonita Chapman (age 22), Wendy Ashley (age 23), Joyce Wick (age 41), Amanda Skeens (age 18) and Carole Morton (age 36).

Consequently, King's request for a review of the application of the doctrine of judicial estoppel, even if granted, would not change the outcome of the case, which was decided on its merits.

Essentially, King seeks an advisory opinion from the Court on a nondispositive issue, when there is no existing justiciable controversy. In *Aetna Life Ins. Co. of Hartford v. Haworth*, 300 U.S. 227 (1937), this Court defined a justiciable controversy as one that

> must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

300 U.S. at 240-41 (citations omitted). Indeed, "the oldest and most consistent thread in the concept of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). Thus, in cases such as the one at bar, this Court routinely refuses to give advisory opinions on questions that cannot affect the relations of the parties. *United States v. Evans*, 213 U.S. 297 (1909). Accordingly, because the Fourth Circuit Court of Appeals has decided this case on its merits on grounds other than those asserted by King to be error, the Court should refuse to grant the petition for writ of certiorari.

B. This case does not present any of the considerations the Court utilizes in exercising its broad discretion to grant a petition for writ of certiorari. Sup. Ct. R. 10(a). This case involves the application of the federal common law procedural doctrine of judicial estoppel to a claim asserted under West Virginia substantive state law. Given the very nature of this case, it cannot be contended that the Fourth Circuit Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same issue.

Nor has the Fourth Circuit Court of Appeals decided an important federal question in a way which conflicts with a decision of the Supreme Court of Appeals of West Virginia. Indeed, the West Virginia Supreme Court has not issued a published opinion on the application of the doctrine of judicial estoppel to cases arising under the West Virginia Human Rights Act, and King has not asserted that the Fourth Circuit Court of Appeals' decision in the case *sub judice* is in conflict with such a decision.

Finally, the Fourth Circuit Court of Appeals has not departed from the accepted and usual course of judicial proceedings, or sanctioned the same by the United States District Court for the Southern District of West Virginia. King's petition does not assert that such a departure occurred in either court. Therefore, none of the considerations identified in the Rules of the Supreme Court of the United States, Rule 10(a) are present in this case, and the Court should, therefore, deny King's request for a writ of certiorari.

C. The lower courts properly ruled that King is judicially estopped from pursuing her claim of age discrimination under the West Virginia Human Rights Act because: (1) she adopted a position before the courts that she is able and competent to perform her job duties, while she maintained before the Social Security Administration that she was totally disabled from performing that job; (2) the Social Security Administration accepted King's prior inconsistent position by instituting payments and ruling that she was disabled one week prior to her discharge; and (3) King intentionally attempted to mislead the lower courts to gain an unfair advantage in this litigation. These findings comport with the standards of judicial estoppel announced in *Lowery v. Stovall*, 92 F.3d 219 (4th Cir. 1996), *cert. denied*, 519 U.S. 1113 (1997).

The law is well-established that plaintiffs will not be permitted to claim to the Social Security Administration that they are so impaired they cannot work and, at the same time, claim in a discrimination lawsuit that they can go to work and perform their jobs. These claims are mutually exclusive, and plaintiffs are judicially estopped from taking these diametrically opposed positions. *Budd v. ADT Sec. Systems, Inc.*, 103 F.3d 699 (8th Cir. 1996); *McNemar v. The Disney Stores, Inc.*, 91 F.3d 610 (3d Cir. 1996); *August v. Offices Unlimited, Inc.*, 981 F.2d 576 (1st Cir. 1992); *Erit v. Judge, Inc.*, 961 F. Supp. 774 (D.N.J. 1997); *Ross v. Indiana State Teacher's Ass'n.*, 955 F. Supp. 1025 (N.D. Ind. 1997); *Harris v. Marathon Oil Co.*, 948 F. Supp. 27 (W.D. Tex. 1996); *Hindman v. Greenville Hosp. Sys.*, 947 F. Supp. 215 (D.S.C. 1996); *Taylor v. Food World, Inc.*, 946 F. Supp. 937 (N.D. Ala. 1996); *Johnson v. U.S. Steel Corp.*, 943 F. Supp. 1108 (D. Minn. 1996); *Miller v. U.S. Bancorp*, 926 F. Supp. 994 (D. Or. 1996); *Smith v. Midland Brake, Inc.*, 911 F. Supp. 1351 (D. Kan. 1995); *Garcia-Paz v. Swift Textiles, Inc.*, 873

F. Supp. 547 (D. Kan. 1995); *Reigel v. Kaiser Foundation Health Plan of North Carolina*, 859 F. Supp. 963 (E.D.N.C. 1994).

The doctrine of judicial estoppel is designed to protect the integrity of the judicial process by "prevent[ing] a party from playing fast and loose with the court." *Lowery*, 92 F.3d at 223 (citations omitted). "[The doctrine] precludes a party from adopting a position that is inconsistent with a stance taken in prior litigation." *Id.*

In *Lowery*, the Fourth Circuit Court of Appeals identified three elements necessary for the application of the doctrine. The Court explained:

> First, the party sought to be estopped must be seeking to adopt a position that is inconsistent with a stance taken in prior litigation.
>
> * * *
>
> Second, the prior inconsistent position must have been accepted by the court.
>
> * * *
>
> Finally, the party sought to be estopped must have intentionally misled the court to gain unfair advantage.

Lowery, 92 F.3d at 224 (citations and quotations omitted). Both the District Court and the Fourth Circuit Court of Appeals correctly found all of these elements to be present in the instant case.

Initially, King is taking a factual position which is contrary to a position she took before the Social Security Administration in her pursuit of Social Security disability benefits. Disability under the Social Security Act is defined as an inability to engage in any substantial gainful activity,

> by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.

See Cline v. Western Horseman, Inc., 922 F. Supp. 442, 446 (D. Col. 1996), *citing* 42 U.S.C. § 423(d)(a)(A). The Act's underlying regulations explain,

> [t]o meet this definition, you must have a severe impairment, which makes you unable to do your previous work or any other substantial gainful activity which exists in the national economy.

Id., *citing* 20 C.F.R. § 404.1505 (1995). Thus, the very definition of disability within the meaning of Social Security law is directly contrary to the concept that an individual is able to perform her job. *See also Pegues v. Emerson Elec. Co.*, 913 F. Supp. 976 (N.D. Miss. 1996); *Fussell v. Georgia Ports Auth.*, 906 F. Supp. 1561 (S.D. Ga. 1995), *aff'd*, 106 F.3d 417 (11th Cir. 1997); *Nguyen v. IBP, Inc.*, 905 F. Supp. 1471 (D. Kan. 1995). On the other hand, the West Virginia Human Rights Act expressly states that an employment action is an unlawful discriminatory practice if an employer discriminates against an individual who is "able and competent to perform the services required." W.Va. Code § 5-11-9(1).

In order to obtain disability benefits, King had to assert before the Social Security Administration that she was unable to perform her job at Thomas or any other job. In fact, King admitted that she was physically unable to work at the time of her discharge from the Hospital. However, in order to maintain a claim for damages under the West Virginia Human Rights Act, King must demonstrate that she was able to work after her discharge. Thus, she has asserted contradictory factual allegations in two forums of litigation.

Next, the Social Security Administration accepted King's factual assertion that she was unable to work after her discharge from Thomas on September 9, 1987, and she has received Social Security disability benefits since that time. In fact, the Administration found that King was disabled as of September 2, 1987 — one week before her discharge. Consequently, the prior forum accepted King's earlier inconsistent factual assertion.

Finally, King's attempt to assert a position in this lawsuit contrary to her position before the Social Security Administration effectively misleads the courts in an attempt to recover damages to which she is not entitled. King has taken one position before the Social Security Administration and the opposite position before the courts. Her position before the Social Security Administration was not accidental or inadvertent. She wanted to obtain disability benefits; therefore, she had to assert that she was unable to work after her September 1987 discharge from the Hospital. On the other hand, to maintain a claim for age discrimination under the West Virginia Human Rights Act, King must demonstrate that she was able to perform the required functions of her job. However, King cannot make one factual assertion to have the advantage of collecting disability benefits, then make the

opposite assertion to have the advantage of collecting damages for employment discrimination. Consequently, the lower courts found that all the necessary elements for the application of judicial estoppel are present in this action.

King argues that the lower courts merely mechanically applied the doctrine of judicial estoppel to act as a *per se* bar to her claim of age discrimination (*see* Petition, p. 7). This is clearly not the case. Rather, both the District Court and the Fourth Circuit Court of Appeals looked carefully at the specific facts of this case and determined that, under the particular circumstances of this case, the doctrine of judicial estoppel should apply to preclude King from asserting a necessary element of her West Virginia age discrimination case.

King implies that she was not disabled until 15 months after her discharge, when she was awarded Social Security disability benefits. Her claim is ingenuine for several reasons. First, the Social Security Administration found that King was disabled as of September 2, 1987 — one week before her discharge. Therefore, King unquestionably has represented to the Social Security Administration that she has been disabled from that date. Indeed, it is her continuing representation that she cannot work, rather than the actual date of the award, which invokes judicial estoppel.

Furthermore, in her deposition, King asserted that she became disabled in 1987, while she was employed or shortly after her discharge. Her assertion now that the onset of her disability was delayed 15 months is contrary to her own testimony. In fact, King's assertion that she sought a job or wanted to work for nearly 15 months after her discharge is wholly unsupported by the record. Those unsupported

allegations are exactly the type of statements that judicial estoppel would prohibit King from asserting in light of her representations to the Social Security Administration.

Moreover, King asserts numerous times in her petition that she did not receive Social Security benefits for fifteen months subsequent to her termination (*see* Petition, pp. 9, 10, 14, 30), implying that her application for those benefits was in close proximity to the receipt of those benefits. However, if such were actually the case, she would have received her disability benefits on approximately the same day that she applied for them. This is simply not possible.

In order to apply for Social Security benefits, a person must submit an application for benefits to the Social Security Administration. 20 C.F.R. § 404.603 (1995). Once an application has been submitted, the applicant must submit evidence to the Social Security Administration that the applicant is, in fact, eligible for the benefits. 20 C.F.R. § 404.703 (1995). The type of evidence needed will be determined by the Administration, and the applicant is given enough time to collect the evidence requested. 20 C.F.R. § 404.705 (1995). Once the applicant has taken all the necessary administration steps, the Administration then reviews all the evidence and the application to determine if the applicant is eligible for the benefits requested. 20 C.F.R. § 404.900 (1995).

Obviously, all of these steps take quite some time, so it would be impossible for the applicant to receive benefits within such a short time of applying for benefits. Clearly, based upon the procedures that must be followed to receive benefits, King's implications to the contrary are virtually impossible.

Next, King asserts that her Social Security award was not based solely upon her physical inability to work but instead considered her age, limited work skills and education, as well as her physical condition. This statement is also ingenuine and is entirely unsupported by the record. King's Social Security award states that her medical providers believed her physical condition might improve and, therefore, that the Administration would reevaluate her entitlement to disability benefits in the future. That provision indicates that the Social Security Administration based its award solely upon King's physical condition. Additionally, King testified under oath that she became physically unable to work while she was still employed or shortly thereafter. Furthermore, her physical condition obviously has not improved because she has continued to receive disability benefits.

King relies upon the Fourth Circuit's decision in *Wells v. North Carolina Bd. of Alcohol Control*, 714 F.2d 340 (4th Cir. 1983), to support her assertion that judicial estoppel is inapplicable here. However, her reliance is misplaced. The plaintiff in *Wells* never asserted that he was totally disabled from working. Instead, he claimed only that he was no longer able to perform a job which required frequent heavy lifting. Furthermore, he never made any assertions about his ability to work before an earlier forum. Therefore, *Wells* is not applicable to this case.

In anticipation of Thomas' arguments, King attempts to distinguish factually the legal authority cited previously herein in support of the application of judicial estoppel. The minute factual details that King distinguishes, however, are not relevant to the issue of whether judicial estoppel should be invoked. The crucial point in all the cited cases is the fact that each plaintiff, like King, asserted before the Social

Security Administration or another judicial forum that he or she was unable to work. The various courts then used that earlier assertion to prohibit each plaintiff from making a contradictory assertion in the later judicial proceeding. As the *Reigel* court explained:

> Plaintiff in the case *sub judice* cannot speak out both sides of her mouth with equal vigor and credibility before this court. Plaintiff now seeks money damages from [her employer] on her assertion that she was physically willing and able to work during the same period that she was regularly collecting disability payments on her assertions that she was physically unable to work.

859 F. Supp. at 970. In *Simo v. Home Health & Hospice Care*, 906 F. Supp. 714 (D.N.H. 1995), the court emphasized:

> The integrity of the judicial system is jeopardized when litigants are permitted to assume contrary factual, not legal, positions for the purpose of achieving advantageous results. The plaintiff, having already reaped the benefits of her past representations of total disability [before the Social Security Administration], may not now advance before this court any claim necessarily based on contrary factual representation.

906 F. Supp. at 721. As in *Reigel* and *Simo*, King's identical attempt to assert diametrically opposed factual allegations is barred by the doctrine of judicial estoppel.

Finally, King attempts to rely, in part, on the recent Equal Employment Opportunity Commission ("EEOC") guidelines

in order to circumvent the application of the doctrine of judicial estoppel. This reliance is misplaced because the EEOC guidelines are not applicable to the present action. This is a case brought under the auspices of the West Virginia Human Rights Act, not the Age Discrimination in Employment Act. The EEOC has jurisdiction over the latter actions, not the former.

Although courts may resort to the EEOC guidelines for guidance, they are not controlling. *Shafer v. Preston Memorial Hosp. Corp.*, 107 F.3d 274 (4th Cir. 1997) *citing Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 349 n.2 (4th Cir. 1996). *See also Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986). Rather, they may be given deference unless the interpretation is in direct conflict with the language of the statute. *Public Employees Retirement System v. Betts*, 492 U.S. 158, 171 (1989). *See also Gaddy v. Four B. Corp.*, 953 F. Supp. 331 (D. Kan. 1997).

In the instant case, the EEOC guidelines are in direct conflict with the plain language of the West Virginia Human Rights Act. The Act states that it is unlawful for an employer to discriminate against a person "if the individual is *able and competent to perform* the services required." W.Va. Code § 5-11-9(1) (emphasis added). On the other hand, the EEOC guidelines state that an individual may be totally disabled for purposes of obtaining Social Security benefits, yet still be able to perform the services required. To allow an individual to claim to the Social Security Administration that he or she is unable to do the previous work or any other work in order to obtain benefits, and then to allow the same individual to claim that he or she is able and competent to perform a job is the essence of contradiction. Consequently, the EEOC guidelines are in direct conflict with the plain language of the West Virginia Human Rights Act and, thus, are entitled to no deference by this Court.

CONCLUSION

For the foregoing reasons, respondent, Herbert J. Thomas Memorial Hospital, prays that this Court deny King's petition for writ of certiorari.

Respectfully submitted,

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